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JURIDICAL REVIEW

JUDICIAL RETICENCE AND PUBLIC POLICY *

HOW should the judge in a free society explain his judgments to the people whose justice he must administer? This may seem an idle question in Scotland, England, or America, where the judicial process has so long been conventionalised by law and by the habits of a rightly conservative profession. The question may even seem indiscreet, when asked by an American visitor in a great nation from whose judges much of his own judicial tradition is derived. Teaching one's grandmother is proverbially impertinent. I can perhaps escape the charge of incivility by hastily disclaiming any primary purpose to analyse or even discuss the laws and customs of Great Britain. The judicial conventions of my own country are the only ones of which I have any substantial knowledge; and if in venturing on some speculations about the judicial task I should mention one or two British authorities this is only because we Americans have never been able to do without them in studying our own problems. What I here propose is some discussion of a question which seems perennial in the United States; the problem, at base, is judicial recognition of the true nature of the judge's task, and the explanation of his function to the people in whose civilisation he is so conspicuous.

On the chart of political philosophy there are few unexplored regions. Most discoveries turn out to be rediscoveries, and a man who comes upon an idea should not be surprised if he finds that many travellers passed that way

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* Being a lecture delivered in the University of Edinburgh, Friday November 16, 1956.

long ago. When the legal realists of a quarter-century ago were pointing out that in judicial decisions the result did not always follow inevitably as a consequence of precedents, they pretended to no novelty, acknowledging that they were only repeating ideas which Sir Henry Maine, J. C. Gray, O. W. Holmes and Roscoe Pound had taught long before. Pound wrote in 1921:

> "Many courts today are suspected of ascertaining what the equities of a controversy require, and then raking up adjudicated cases to justify the results desired. Often formulas are conveniently elastic so that they may or may not apply. Often rules of contrary tenor overlap, leaving a convenient no-man's-land wherein cases may be decided either way according to which rule the court chooses in order to reach a result arrived at on other grounds. Occasionally a judge is found who acknowledges frankly that he looks chiefly at the ethical situation between the parties and does not allow the law to interfere therewith beyond what is inevitable." [1]

That some judges, more than others, are conscious of their occasional creative function; that some judges, more firmly than others, prefer to state their opinions in the conventional form of deduction from precedent or statute; that public confidence in the predictable and continuous quality of the law is useful and wholesome—no one of these propositions is at all new or startling. Nevertheless, it is recurrently interesting to speculate a little concerning the effect on the public, and, indeed, on judges themselves, of explicit judicial discussion of policy considerations or of moral concepts. The endless series of problems in human conflict, appearing year after year in the published law reports, continually furnishes fresh examples.

That the judgments of American courts are in many cases necessarily governed by judicial views of wise policy now seems so obvious a statement that it hardly deserves elaborate repetition in a learned journal. Surely few men have been as discerning about the operation of the legal system as Oliver Wendell Holmes, who told us in 1881 that many judgments are legislative in their nature.[2] A great English judge—I refer to Sir Alfred Denning—has recently reminded us of the same thing in " The Changing Law "; he wrote of judges—" The truth is that they do every day make law, though it is almost heresy to say so."[3] Even when no question arises of laying down a wise future rule, but only of making a just and satisfying disposition of an apparently unique controversy, moral or equitable considerations frequently make intolerable the derivation of the decision from equivocal precedent or uncertain statutory precept.

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[1] *An Introduction to the Philosphy of Law*, p. 121

Of course, I hasten to add, I am fully aware that much of a judge's task is and should be settled, by express statutory direction, or by judicial precedent, so precise that policy argument or moral concern can play no part. When Roscoe Pound wrote " The law must be stable and yet it cannot stand still," he mentioned stability first.[4] The overtime parker of an automobile in Harvard Square would probably not persuade a Cambridge magistrate that no penalty was due by urging that an hour's tarrying was an unreasonably short privilege for five cents in the parking meter; one sued on a note held by a discounting bank would find it difficult to attack the doctrine of negotiability by argument that the doctrine was socially unwise. I take it that neither Mr. Justice Holmes nor Sir Alfred Denning referred to any such crystallised propositions. But other problems of judgment are continually appearing, in which the choice is much more subtle.

They appear, for example, in the intergovernmental relations of all federal nations. In July of 1956 the Judicial Committee of the Privy Council had before it for the second time the validity of New South Wales statutes concerning a licence fee imposed by that State on carriers by motor-vehicle. In 1954 the Privy Council, reversing the High Court of Australia, had held such a fee invalid when applied to interstate business,[5] as conflicting with section 92 of the Australian Constitution, " . . . *trade, commerce, and intercourse among the States, whether by means of internal carriage or ocean navigation, shall be absolutely free.*" Lord Morton of Henryton said, when delivering the judgment of their Lordships:

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[2] *The Common Law*, pp. 35, 36.

[3] p. 45.

[4] *Interpretations of Legal History* (1922), p. 1.

> " . . . through all the subsequent cases in which section 92 has been discussed, the problem has been to define the qualification of that which in the Constitution is left unqualified. In this labyrinth there is no golden thread . . . The problem to be solved will often be not so much legal as political, social, or economic, yet it must be solved by a court of law."

In July, 1956, the Privy Council, this time affirming the High Court, held that another New South Wales statute, barring recovery of such licence fees invalidly collected in the past, was similarly invalid[6]: the opposite result, their Lordships said, would " be a mockery of the spirit of the Constitution."

That such political, social or economic decisions are inescapable in public law seems to me patent. The Australian Constitution expresses a general policy in favour of a free flow of commerce, but the constitution makers did not tell us whether they thought highway traffic regulations for motor-vehicles, or tolls on a toll-bridge, were intended to be invalidated by section 92. The Judicial Committee stated, in their 1954 opinion, that neither reasonable traffic regulation nor tolls would be invalid; but distinguished the licence fee as prohibition, not protection, of free trade. One can, of course, discuss the matter in terms of legislative

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[5] *Hughes and Vale Proprietary, Ltd.* v. *State of New South Wales* [1955] A.C. 241; [1954] 3 W.L.R. 824; [1954] 3 All E.R. 607.

[6] *Commissioner for Motor Transport* v. *Antill Ranger & Co. Pty.* [1956] A.C. 527; [1956] 3 W.L.R. 499; [1956] 3 All E.R. 106.

" intent "; one can say that the constitutional draftsmen must have meant to permit regulations reasonably necessary under road conditions as they might develop, without however permitting any sort of a local customs-charge or State import-duty; and that if the draftsmen had been asked to state their intent on the specific problem at bar, they would have said that the licence fee New South Wales imposed, and the subsequent statute barring recovery of fees invalidly exacted, were in conflict with their free-trade policy. But this merely pushes the question one formula farther away. When the judge decides what the legislator would have done if the legislator had exercised sound judgment on a specific question of policy, the judge is himself deciding the policy question by his own criteria.

Judges in the United States, too, if they are to decide such difficult governmental questions at all, are similarly obliged to decide them with due regard to the practical effect. This seems evident to me, and I do not propose here further to belabour the proposition. What I intend rather is to see what sorts of reasoning the Supreme Court of the United States has used in a few recent cases of note, and to speculate a little on the results of different conventions of statement. Does an explicit acknowledgment of the law-making function of our judiciary make the judges' task easier or harder? Does the more conventional theory that, even in such cases as I here discuss, our judges find the law ready-made rather than create it from wisely chosen general principles, lend the judges confidence in exercising their difficult duty of choice? Where a decision of wide public importance depends for its effective enforcement on general acceptance, will that acceptance come more readily if the judgment is stated in the classic terms of a government of laws, and not of men?

In the social sciences, of which law is the oldest and most widely accepted, there is no system of measurement corresponding to the laboratory techniques of physics or chemistry. The elaborate statistical analysis of some sociological studies may only end by laboured demonstration of what our grandmothers knew without any trouble. And even this process of counting and arranging gleaned data is impractical in estimating the comparative effect of different types of judicial opinions. The thought of sending forth teams of opinion-samplers to ask people how they accept various sorts of judicial utterances does not, at first glance, promise reliable conclusions. Thrown back on ancient procedures of estimation, one is uneasily conscious of their weakness, comforted a little by the feeling that here any guess so made is not much more likely to be wrong than one supported by elaborate apparatus.

In those parts of the United States where the public-school desegregation decisions are most unpopular, we have recently been seeing a conspicuous example of this problem of acceptable judicial expression. As everyone now knows, the Supreme Court, in May, 1954, overruling a leading case which had stood for fifty-eight years, held that a state which provides public schools segregated by race denies to the segregated pupils the constitutionally guaranteed equal protection of the laws.[7] Many decades of legislative practical construction, many adjudications of state and federal courts had to be upset if the plaintiff school-children were to be given the relief they sought. It became apparent that this result could not be achieved by extrapolation of previous judicial decisions, or by words in the Constitution, and the grounds relied on by the court present a study of expressed criteria which are relevant to this discussion.

Chief Justice Warren disposed of the weight of precedent by pointing out that today's conditions are not those of a dead generation. He wrote:

> " In approaching this problem, we cannot turn the clock back to 1868 when the Amendment was adopted, or even to 1896 when *Plessy* v. *Ferguson* was written. We must consider public education in the light of its full development and its present place in American life

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[7] *Brown* v. *Board of Education*, 347 U.S. 483 (1954).

> throughout the Nation. Only in this way can it be determined if segregation in public schools deprives plaintiffs of the equal protection of the laws.
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> " Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society, . . . Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.
>
> " We come then to the question presented: Does segregation of children in public schools solely on the basis of race, even though the physical facilities and other 'tangible' factors may be equal, deprive the children of the minority group of equal educational opportunities? We believe that it does."

As to the effect of equal but separate education of the children he adopted the language of a lower court, and added to it still more material, dealing with the psychological consequences of the system.

> " . . . The effect of this separation on their educational opportunities was well stated by a finding in the Kansas case by a court which nevertheless felt compelled to rule against the Negro plaintiffs: 'Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the Negro group. A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to [retard] the educational and mental development of Negro children and to deprive them of some of the benefits they would receive in a racial[ly] integrated school system.' Whatever may have been the extent of psychological knowledge at the

> time of *Plessy* v. *Ferguson*, this finding is amply supported by modern authority.* Any language in *Plessy* v. *Ferguson* contrary to this finding is rejected.
>
> "We conclude that in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal."

The result reached in this case seems eminently just to me. The stated grounds gave rise to bitter outcry in affected areas of the United States, though one must acknowledge that no wording of the opinion would have made it palatable in those states—eight in number—where resistance is still state-wide. The alarm, rung through many changes, was that the Supreme Court had turned from law to psychology, and that it should have stayed with law. Senator Eastland of Mississippi on May 27, 1954, told the United States Senate:

> "The Supreme Court could not find the authority for its decisions in the wording of the 14th Amendment, in the history of the amendment, or in the decision of any court. Instead, the court was forced to resort to the unprecedented, unsound, and irrelevant authority of a group of recent partisan books on sociology and psychology. If this is the judicial calibre of the court, what can the Nation expect from it in the future? What is to prevent the court from citing as an authority in some future decision the works of Karl Marx?"[8]

The same judicial determination in substance, made without reference to the language of a science not yet

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"* K. B. Clark, Effect of Prejudice and Discrimination on Personality Development (Midcentury White House Conference on Children and Youth, 1950); Witmer and Kotinsky, *Personality in the Making* (1952), c. VI; Deutscher and Chein, 'The Psychological Effects of Enforced Segregation: A Survey of Social Science Opinion,' 26 J.Psychol. 259 (1948); Chein, 'What are the Psychological Effects of Segregation under Conditions of Equal Facilities?' 3 Int.J.Opinion and Attitude Res. 229 (1949); Brameld, *Educational Costs, in Discrimination and National Welfare* (McIver, ed., 1949), 44–48; Frazier, *The Negro in the United States* (1949), 674–681. And see generally Myrdal, *An American Dilemma* (1944)." [Footnote by the court.]

[8] Vol. 100, *Congressional Record*, p. 7252.

universally accepted, might have eliminated some of this particular form of criticism, but one guesses that the judgment would have been no more pleasing to the objectors. And the court's trouble is really inevitable. The Fourteenth Amendment requires the States to refrain from unjustifiable inequality of treatment; and inequality cannot very well be considered without examining the effect of the governmental action on human beings. This effect is not to be found by examining reported opinions. Sir William Blackstone is scarcely open to the charge of being a radical psychological faddist, but in his inaugural Vinerian Lecture in 1758 he wrote, "The only true and natural foundations of society are the wants and fears of individuals."

On November 19, 1956, the Supreme Court of the United States, with only a brief memorandum containing no explanatory text, held that segregation by law on intrastate omnibuses was unconstitutional.[9] As the memorandum cites the school case and two others (which are themselves only similar memoranda) its form is conventional; it suggests that the judgment follows syllogistically from the cases cited. That it will have any more cordial acceptance because of its form is questionable. One suspects that people look to results more than forms in their criticism of governmental action.

In the past, judgments of the United States Supreme Court have often aroused widespread resentment, but the form of the opinion seems to have had little to do with the popular reaction. Nothing could have aroused much more indignant outcry, from those who were disappointed, than the decision of the United States Supreme Court in 1936 holding the Agricultural Adjustment Act of 1933 *ultra vires* the national government, yet Mr. Justice Roberts' opinion, written for the court, was strictly orthodox.[10] The object of the statute was to raise the economic position of farmers, who were depressed by overproduction of crops. The plan adopted was to tax processors of farm produce and pay a bonus from the sums so raised to those farmers who would restrict their acreage. The objection, sustained by a majority of the court, was that control of growing crops on a farm could not reasonably be thought to be within the federal power to regulate interstate commerce. This position was abandoned by the court six years later. But my interest here is in the form rather than the substance of the court's opinion. Mr. Justice Roberts wrote:

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[9] *Gayle* v. *Browder*, 77 S.Ct. 145 (1956).

[10] *U.S.* v. *Butler*, 297 U.S. 1 (1936).

> "There should be no misunderstanding as to the function of this court is such a case. . . When an Act of Congress is appropriately challenged in the courts as not conforming to the constitutional mandate the judicial branch of the Government has only one duty—to lay the article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former. All the court does, or can do, is to announce its considered judgment upon the question. The only power it has, if such it may be called, is the power of judgment. This court neither approves nor condemns any legislative policy. Its delicate and difficult office is to ascertain and declare whether the legislation is in accordance with, or in contravention of, the provisions of the Constitution; and, having done that, its duty ends."

The violence of the reaction against the A.A.A. case was not I think, any the less because of this disclaimer by Mr. Justice Roberts of any policy considerations, nor because of his expression of an ideal of literalism. Indeed, the 1930's heard liberal protest because in opinions seeking to define the Tenth Amendment, or that vague canon of public justice, "due process of law," some judges continued to use the formulae of logic and syllogism. In a somewhat violent attack on the court, a book popular in 1937 said discussing the A.A.A. case:

> "Finally, Roberts also has the gift, so important in an opinion certain to meet with popular disapproval,

of wrapping the unpalatable portions in a maze of immensely impressive legal verbiage."[11]

Now that the New Deal has been held constitutional for twenty years, it is difficult in retrospect to derive the lack of due process in the Railroad Retirement Board case of 1935[12] or the New York Minimum Wage case of 1936[13] from any premises in the wording of the constitution, or indeed from any premise except the justices' feeling that in a decent society there must be somewhere a limit to legislative intermeddling with a minority's economic affairs to benefit the many at the expense of the few, and that here those limits had been passed. Perhaps there may have been a feeling among American economic liberals in the mid-thirties that a frank statement, and so a frank perception, of the policy basis of constitutional decisions dealing with economic regulation, in place of the conventional formula of restating a supposedly existing legal rule, would result in more judicial tolerance for economic innovation by American legislators. When legislators, moved by indignation at economic injustice, passed statutes intended to correct the balance, the American liberal of the thirties wished the courts to abstain from interfering; and as to economic legislation this attitude has almost completely prevailed with the federal judiciary. Economic due process imposed by the federal Constitution is something very like a dead letter. However, judicial abstention may have its drawbacks. Legislators, moved by indignations other than economic, sometimes intervene in the realm of political freedoms, making judicial intervention welcome, not deplorable, to the American liberal. One may speculate, a little curiously, on the most appropriate form of opinion in such a case. Would the public, or that undetermined fraction of it which pays any attention to judicial opinions, be best served by the assumption that constitutional clauses explain their own application to specific cases?

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[11] Pearson, D. and Allen, R. S., *The Nine Old Men* (1936), p. 287.

[12] *Railroad Retirement Board* v. *Alton R.R.*, 295 U.S. 330 (1935).

[13] *Morehead* v. *Tipaldo*, 298 U.S. 587 (1936).

Conflict between the First Amendment guarantee of freedom of speech and various federal statutes penalising seditious advocacy has produced interesting examples of judicial recognition of policy considerations. In 1919 Mr. Justice Holmes laid the foundation for many later opinions when he proclaimed his " clear and present danger " doctrine. The issue was the constitutional right of a man named Schenck to circularise drafted soldiers with leaflets denouncing the draft as a monstrous conspiracy. Schenck was convicted of violating federal statutes penalising attempts to obstruct recruiting and of other similar violations, and sought a reversal in the Supreme Court on the ground that, as applied to him, these statutes were void because in conflict with the First Amendment.[14] Holmes wrote in the court's opinion for affirmance:

> " The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree."

Here is a statement of another judicial duty for which no real guidance can be found in precedent. In 1950 the United States Court of Appeals for the Second Circuit was considering the appeal of eleven men convicted, under the Smith Act of 1940, of advocating " . . . the necessity, desirability, or propriety of overthrowing or destroying any government in the United States by force or violence. . . ." Judge Learned Hand, writing the court's opinion for affirmance,[15] discussed the problem of applying the " clear and present danger " standard.

> " . . . The phrase, ' clear and present danger,' has come to be used as a shorthand statement of those

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[14] *Schenck* v. *U.S.*, 249 U.S. 47 (1919). The relevant language of the First Amendment is " Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

[15] *Dennis* v. *U.S.*, 183 F.2d 201 (C.A.2d 1950); see p. 212.

> among such mixed or compounded utterances which the Amendment does not protect. Yet it is not a *vade mecum*; indeed, from its very words it could not be. It is a way to describe a penumbra of occasions, even the outskirts of which are indefinable, but within which, as is so often the case, the courts must find their way as they can. In each case they must ask whether the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger. . . .
>
> "We need not say that even so thoroughly planned and so extensive a confederation would be a 'present danger' at all times and in all circumstances; the question is how imminent; that is, how probable of execution—it was in the summer of 1948, when the indictment was found. We must not close our eyes to our position in the world at that time. . . . The *status quo*, hastily contrived in 1945, was showing strains and tensions, not originally expected. Save for the unexpected success of the airlift, Britain, France and ourselves would have been forced out of Berlin, contrary to our understanding of the convention by which we were there. . . . Any border fray, any diplomatic incident, any difference in construction of the *modus vivendi*—such as the Berlin blockade we have just mentioned—might prove a spark in the tinder-box, and lead to war. . . ."

Judge Hand is here, inescapably, making a decision on criteria much like those of a Foreign Office official; and certainly his judgment cannot proceed from printed judicial precedent to practical conclusion. Granted his constitutional duty, his use of high policy criteria was inevitable. The Supreme Court, subsequently affirming the Court of Appeals,[16] endorsed his statement, though Justices Black and Douglas dissented on the ground that the First Amendment protected the defendants in their utterances.

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[16] *Dennis* v. *U.S.*, 341 U.S. 494 (1951).

" Due process of law " is another constitutional phrase which in many cases calls for a policy definition. How formulate a selective due process? How formulate a doctrine wide enough to cover human rights but to allow ample property regulation? From this dilemma arose within the Supreme Court one of the notable differences in constitutional theory of our times. Mr. Justice Black, seeking to give literal certainty to the Fourteenth Amendment due-process clause, has contended that its inclusive terms merely restate the specific limitations of the first eight Amendments. One gathers that he would feel more comfortable about the rights of the citizen if the Supreme Court discussed the constitutionality of statutes as dependent on the letter of the Constitution. He once wrote:[17]

> " I fear to see the consequences of the court's practice of substituting its own concepts of decency and fundamental justice for the language of the Bill of Rights as its point of departure in interpreting and enforcing that Bill of Rights."

In contrast Mr. Justice Frankfurter has boldly stated that due process is a standard requiring judicial considerations apparent neither in its own terms nor in the terms of the Bill of Rights.[18]

> " In each case, ' due process of law ' requires an evaluation based on a disinterested inquiry pursued in the spirit of science, on a balanced order of facts exactly and fairly stated, on the detached consideration of conflicting claims . . . on a judgment not *ad hoc* and episodic but duly mindful of reconciling the needs both of continuity and of change in a progressive society . . . Due process of law, as a historic and generative principle, precludes defining, and thereby confining, these standards of conduct more precisely than to say that convictions cannot be brought about by methods that offend ' a sense of justice.' "

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[17] Dissenting in *Adamson* v. *California*, 332 U.S. 46 (1947) at p. 89.

[18] *Rochim* v. *California*, 342 U.S. 165 (1952) at pp. 172 and 173.

Clearly the conventions of judicial expression are important not only to the affected public but also to the judges who must bear the responsibility of deciding cases. I once heard a judge sentence to death a man convicted of murder. In imposing sentence the judge explained that the law allowed him no choice; even in less awful moments judges must still proceed with more confidence if they believe that they have no real option, but that the written word constrains them in their judgment.

The problem of selective judicial activism and its justifying literature is not limited to cases arising under a written constitution, in which an inconsistent statute may be held invalid. Court battles at least as great have raged in Great Britain and in America concerning executive activity which overruns bounds set by a legislature. In democratic countries the executive seems in our time to be playing a greater and greater part. The character of legislation seems to be changing; more norms are prescribed in general terms while their precise definition is left to the executive. This may necessarily be so, in view of government's increasing complexity. Perhaps the great controversies in the public law of tomorrow may arise between judge and executive, like some of those of the early seventeenth century; and here too judges may discuss high policy rather than rely on a chain of precedent.

The great debate of 1612 between Coke and King James echoed in the United States Supreme Court in 1952. The issue in the latter year was the power of the President to take possession of and operate most of the nation's steel mills, when during the Korean war the nation's supply of munitions was threatened by a strike. The Supreme Court, with three justices dissenting, held that without Congressional authorisation the President lacked the power to seize the mills.[19] There were some statutes which conceivably might have been construed to empower the President to make the seizure, but the majority of the court found that these statutes did not authorise the action taken.

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[19] *Youngstown Sheet and Tube Co.* v. *Sawyer*, 343 U.S. 579 (1952).

Six justices wrote separate opinions expressing in different ways the majority point of view. For the purposes of the present discussion one of the most significant was that of Mr. Justice Jackson, who spoke from vivid recollection of his own days as Attorney-General, when he had been charged with the duty of advising a President on drastic action in emergencies. He wrote:

> " A judge, like an executive adviser, may be surprised at the poverty of really useful and unambiguous authority applicable to concrete problems of executive power as they actually present themselves. Just what our forefathers did envision, or would have envisioned had they foreseen modern conditions, must be divined from materials almost as enigmatic as the dreams Joseph was called upon to interpret for Pharaoh. A century and a half of partisan debate and scholarly speculation yields no net result but only supplies more or less apt quotations from respected sources on each side of any question. They largely cancel each other. And court decisions are indecisive because of the judicial practice of dealing with the largest questions in the most narrow way.
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> " The actual art of governing under our Constitution does not and cannot conform to judicial definitions of the power of any of its branches based on isolated clauses or even single Articles torn from context. While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government."

The Steel Seizure decision was well received in the United States, and the labour strife was settled in reasonably short time. But the question presented was not an easy one, and if the enemy had been closer, if the lack of war supplies had been even more critical,—if for example the President had seized available aviation fuel for lack of which the Air Force had been grounded, and our troops had as a result of the lack been subject to enemy bombardment unopposed,—one doubts that the Executive would have been enjoined.

O. W. Holmes wrote in 1881 [20]:

> " It is something to show that the consistency of a system requires a particular result, but it is not all. The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges shared with their fellowmen, have had a good deal more to do than the syllogism in determining the rules by which men should be governed.
>
> " . . . in substance the growth of the law is legislative. And this in a deeper sense than that what the courts declare to have always been the law is in fact new. It is legislative in its grounds. The very considerations which judges most rarely mention, and always with an apology, are the secret root from which the law draws all the juices of life. I mean, of course, considerations of what is expedient for the community concerned."

Ultimately the subject of this paper is the use we are to make of our judges. The world's machinery, mechanical and human, grows more and more intricate ; its breakdowns affect greater and greater areas. The need to give effective government to a dangerously technical society is peremptory ; but the effects of mass-communications and world-wide semi-education make government increasingly difficult and at times seem to bring almost to a standstill the legislative process in deliberative assemblies. The most that ought to be expected of legislatures in important statutes is prescription of fairly general policy. The administrator or the judge must make the application in specific cases. Of course there will be a great multitude of instances where the statute, despite its generality, is entirely clear, where there is no need for policy argument. And general statutes in time acquire a decisional gloss which may in a specific case be as clear and as immutable as a precise legislative rule. But men continually invent new machines, make new social arrangements, and so generate new controversies for which the old rules, constitutional, legislative, or decisional, do not apply. The judge is obliged to turn to the imponderables of policy and morals for a rule of decision ; the spectator is led to wonder as to the effect of a frank statement of these grounds.

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[20] *The Common Law*, 1, 35.

The choice of a formula of " finding the law," traditional among us for hundreds of years, is certainly not to be considered an exercise of disingenuous cunning. The firm integrity of a man like Roberts, obvious to anyone who knew him, is utterly inconsistent with double-talk, nor is the " policy " opinion always clearly distinguishable from that based on precedent. A large element in the determination of future policy is the remembrance of things past. Experience is an important component of morals. Historical and social precedent blend with legal precedent at the points where they meet. The difference between the two types of opinion here discussed is thus clear only in extreme examples. Nevertheless cases do arise which have to be decided on grounds other than precedent or statute, and I believe that when this occurs the result is apt to be better if the judge clearly sees, and acknowledges to himself and to his people, the nature of his process. The available evidence does not suggest to me that one type of opinion is more generally acceptable than another to the affected public. Surely a people whose most fundamental political tenet is their capacity to govern themselves will not think their liberties less safe, will not be less content with their institutions, if they see clearly the manner in which these institutions operate. We were long ago told that if we should know the truth, the truth would make us free.

ARTHUR E. SUTHERLAND.*

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REFLECTIONS ON *LAW AND ORDERS*

LAW AND ORDERS[1] first appeared in 1945, at a time when there was some prospect of a return to normal—indeed it was the first legal book which your reviewer bought when it once more looked possible that he might return to the law. It was something of a " tract for the times." Emergency legislation had flourished, delegated legislation had proliferated, the habit of obedience to orders had become ingrained, and regulation had existed for so long that it was all the more readily accepted. Sir Carleton Kemp Allen's book appeared as a sharp reminder that power too little regulated and too readily accepted could be dangerous. The impression which the book made was due not merely to the timeliness of its appearance, but also to the vigour of the author's style. The views were clear and argued with force.

Now a second edition appears at a time when the " normal," to which some of the readers of the first cast back their minds, has not returned. The power of the executive has not greatly diminished; indeed, after the first edition appeared both the Supplies and Services (Transitional Powers) Act, 1945, and the Supplies and Services (Extended Purposes) Act, 1947, found their way on to the Statute-book. To the pre-war warnings of a Lord Chief Justice could have been added those of a post-war Lord President.[2] *Franklin* v. *Minister of Town and Country Planning*,[3] or *Pollok School Co., Ltd.* v. *Glasgow Town Clerk*,[4] could be read by some as re-emphasising many of the fears expressed by the author. From the former case he concludes that administrators appear now to be incapable of bias " unless it can be proved (which is virtually impossible) that they are either corrupt, or feeble-minded, or utterly irresponsible." Passages in the judgments in the latter case could be said to tend to the same conclusion, which is still further reinforced by *Smith* v. *East Elloe R. D. C.*[5] which was too late to be included in the book. The unreasonable exercise of powers could have been as well illustrated by *Macleod* v. *Mackenzie*[6] as by any of the war-time cases which are set out in the book.

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[1] *Law and Orders* (Second Edition), 1956. By Sir Carleton Kemp Allen Q.C. London: Stevens & Sons, Ltd. 474 and (Index and Tables) 14 and 8 pp. £2 2s. 0d.

[2] " Administrative Justice " by Lord Cooper: *Public Administration* (1954) Vol. XXXII, 165.

[3] [1948] A.C. 87.

[4] 1946 S.C. 373, S.L.T. 365, particularly *per* Lord Normand at p. 386; though contrast the limits of the acceptance of this opinion by Lord Cooper, 1947 S.C. 605 at 620, 1948 S.L.T. 45.

These references could be used to show that the situation has changed little in the past twelve years, just as the quotation indicates that the nature of the author's attack has remained unaltered. It should not be thought, however, that the new edition is simply the old slightly refurbished. Much, which related to war-time conditions, has disappeared and has been replaced by more recent material. Crichel Down is there, even *The Economist's* Parkinson's Law, on the multiplication of offices, finds its place, as does the Hoover Commission (from the U.S.A.) on the organisation of government. Allowance is made for intervening events which run counter to the triumph of bureaucracy, for the work of the Scrutiny Committee on Statutory Instruments, or for the Crown Proceedings Act, 1947. Happily, in this extensive process of rewriting the book has lost none of its vigour. It was perhaps that vigour which, as the author asserts in his preface, made some regard the first edition as something of a political polemic. Certainly that description is not and was not deserved, though equally certainly the author writes with burning conviction and pleads hard for a case. It will, however, be a sad day when all law books make safe and dull reading, and it would be a mistake if the concentration on the more purple patches leads any reader to neglect the solid and close legal argument that there is around such cases as *Simmonds* v. *Newell.*[7] The new edition, as much as the old, deserves careful attention; and it must be remembered that the scope of the book is broader than the title suggests. It is no mere book on delegated legislation, but a survey of administrative activity, its dangers and controls.

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[5] [1956] A.C. 736.

[6] 1947 J.C. 103, S.L.T. 335. Lord Cooper's opinion in that case deserves reading as well for its elegance as for its reasonableness. The case is not referred to, although it is one which would have appealed to the author.

Yet when that is said it remains to be determined whether a good case has been made out, or indeed whether the right case has been made. These questions have added point since the author ends by recommending an administrative Court of Appeal in the shape of the Administrative Division of the High Court (of England) envisaged in the Liberties of the Subject Bill, 1954, which would have a very extensive power to review administrative decisions whether or not founded on an inquiry. He also recommends a review of parliamentary procedure to ensure effective control over delegated legislation. The substance of the indictment remains what it was in 1945—" Sub-law grows in range and vigour " on the one side, and on the side of administrative adjudication " the march of events has defeated the resources of the common law." Neither a simple nor a general answer can be given to these questions. Particularly on administrative adjudication the situation may not prove to be the same in Scotland as it is in England, and any answer depends, perhaps, on personal and non-legal views. Yet the attempt to give answers is worth while at the present time.

There is of course substance in the indictment, though that admission does not involve the acceptance of the indictment as proved or of the suggested remedies. There are times when the case, as made in the book, is pressed hard. It is said (at p. 135): " A considerable number of civil servants—in the opinion of some, too many—are authorised to sign as delegates of Ministers." The impression left by such a sentence is not fully counterbalanced by the later quotation, in a different context, from the Select Committee on Delegated Legislation, which found that " The approval of the Minister must be obtained for every important instrument, most and certainly all the more important instruments are signed by the Minister." To this quotation the author does not give great weight. Yet, its importance is enhanced when the evidence of Sir Frank Newsam before that Committee is borne in mind. One answer will make the point. " (Mr. John Edwards) ' I want to ask you a point on that. In the case of these bye-laws which, according to the Memorandum, are formed by the Secretary of State himself, need he confirm them? Is that not a job that can be done by the Parliamentary Under Secretary or by senior officials of the Department?' (Sir Frank Newsam) ' I would not like to enter into that. In fact we never ask whether it could be done by anybody else. When Parliament says it is to be done by the Secretary of State, and it is in the legislative field, we think that it should be done by the Secretary of State, who has to take the responsibility. Also it facilitates proof. If the Secretary of State has signed the bye-law presumably he has read it and applied his mind to it. So that for two reasons it has never occurred to us that anybody else could do it. Secondly as a matter of the Ministry's convenience it is obviously desirable.' "[8] The last sentence is perhaps arguable, but the earlier parts of the answer depict no civil service greedy of the power of signing. Indeed, Sir David Milne underlined the same point. Speaking of Scottish administration, where there are obvious practical difficulties, he said, when asked whether ministerial approval was obtained if there was no ministerial signature, " His [the Secretary of State's] approval is obtained to the provisions before they are signed. In those cases they are signed by an officer such as an Under Secretary or an officer of equivalent rank, with two exceptions "[8a] (the exceptions referred to the limited powers of the Fisheries Secretary and the Senior Assistant-Secretary of the Department of Agriculture).

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[7] [1953] 1 W.L.R. 826.

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[8] Minutes of Evidence, Select Committee on Delegated Legislation, H.C.P. (1952–53), 310–311, Q. 938—clearly if this attitude is adopted to the confirmation of by-laws, the making of delegated legislation itself is not likely to be more lightly treated.

[8a] *Ibid.*, Q. 480. The same witness also demonstrated the greater use of the staff of the Scottish Law Officers as an additional safeguard.

On such evidence the inferior civil servant busily signing away does not exist.[9] Nor does the civil service take its legislative functions lightly. Again, Sir Frank Newsam said, when speaking of positive and negative resolutions, " I think there is such a respect for liberty even in these days that when the matter at issue involves the liberty of the subject, or encroaches on people's rights, I do not think any department would dare to suggest a negative resolution." [10] This morality on the part of the civil service creates its own problems. The Minister could be overwhelmed and, granted a society in which general conditions of life and thought have necessitated so much legislation, it is arguable that the power of signature is too narrowly confined, and not too broadly granted.

In the same way other shots at delegated legislation do not always hit the mark squarely. Some of the supposed faults of delegated legislation are faults of legislation in general. Delegated legislation may at times be difficult to trace, but it is hardly more so than private legislation, which may affect the innocent individual just as much. The itinerant vendor of logs who crosses the unmarked boundaries of the City of Manchester is unlikely to remember that he has come within the scope of section 38 of the Manchester Corporation Act, 1954.[11] Again, the problem of intelligibility is a real one, but often it is no more serious in delegated legislation than elsewhere. The schedules to the Administration of Estates Act, 1925, were amended, without specific reference, by sections 91 and 115 of the Companies Act, 1947, which were preserved and amended by the Companies Act, 1948 (16th Sched.), and which themselves amended the Bankruptcy Act, 1914, which was incorporated in the Administration of Estates Act, 1925. Legislation by reference is an inconvenient and ugly device wherever it is used, yet it can be defended on the ground of legal tightness. Lawyers may seek, and courts may find, significance in slight changes of wording which are often inescapable in the process of redrafting to incorporate amendments, and it must be remembered that in many of the fields governed by delegated legislation there are as many people looking for a loophole as there are looking for one in a Finance Act. Forms of draftsmanship are often the consequences of the methods and rules of judicial interpretation. The defence cannot of course be absolute. No one can defend the device when the result is that the mysteries of a statutory instrument baffle its sponsors.[11a]

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[9] Of course there are exceptions, mainly due to pressure of work, see, *e.g.*, *Minutes* Q. 1051 (Ministry of Food) or Q. 1265 (Board of Trade).

[10] H.C.P. (1952–53), 310–311 Q. 942.

[11] Nor is the creditor of a professor in a Scottish university likely to know that any arrears due by the professor to the Churches' Widows Fund have under the Churches and Universities (Scotland) Widows' and Orphans' Fund Order Confirmation Act, 1954, absolute priority over all other debts; nor will creditors be likely to know that annuities under that Act or under a similar Order Confirmation Act of 1955 governing the Writers to the Signet Widows' Fund are both absolutely protected from creditors. All these Acts are of course private. Probably, too, those most likely to offend against the Protection of Birds Act, 1954, are those least likely to know they are doing so.

Indeed, the general problem of clarity is a major one. It is easy to say that in creating an offence the instrument should be abundantly clear. Statutes are often no more successful than statutory instruments. The apparent clarity of the definition of stealing in the Larceny Act, 1916 (s. 1), merely conceals its real obscurity.[12] The intricacies of superannuation regulations are at least no worse than those of income tax legislation. The fault lies not with the draftsman, but with the subject-matter. Intelligibility is a relative matter. What is important is that the instrument should be clear to those who are most concerned with it and account must now be taken of the changed nature of law.

[11a] See, *e.g.*, the debate on the Police (Superannuation) Regulations in H.L.Deb. (1952), Vol. 179, cols. 825–826.

[12] The difficulty is common to all attempts at precise formulation of general principles; the method of incorporation of the doctrine of diminished responsibility into the law of England in the Homicide Act, 1957, s. 2, demonstrates this difficulty: see, *e.g.*, *R.* v. *Dunbar*, *The Times*, July 6, 1957; [1957] 3 W.L.R. 330. That case, and the case reported with it, also demonstrate the point made on consolidation.

In the nineteenth century law was predominantly made for lawyers. No lawyer complained, with great heat, of the unintelligibility of Conveyancing Acts. Indeed, measures which reduce general intelligibility are welcomed.[13] There is little complaint because lawyers work the legislation and lawyers know their own language. Today, most legislation is not made for lawyers. It is made for the egg-farmer, the chemist, the engineer, and what matters is that it should be intelligible to the technician, not the lawyer. The regulations[14] made under the Heating Appliances (Fireguards) Act, 1952, involving, as they do, references to British Standard Specifications and excursions into solid geometry, are certainly not readily appreciated by the lawyer, yet doubtless they provide clear working standards for the designer of fire-guards. Thus the criticism that consultation in the preparation of statutory instruments does not produce clarity[15] may often be beside the point. Often the object of consultation is to secure efficiency, and efficiency for the purposes of the technicians may well be incompatible with clarity for the layman (with whom must be ranked the lawyer in this context).

There is, perhaps, in the criticisms of intelligibility some element of lament for a world that cannot return. Those regrets also influence views on "controls." No doubt it is easy to agree with Sir Carleton Kemp Allen that "Far too much emphasis can be laid on the incompetence of Parliament to deal with the technical. A very great deal and perhaps the majority of legislation is of a technical character, and has always been so."[16] Yet agreement with the words does not always include agreement on the meaning to be given to them. Technicality has, as has been suggested, changed in its character. Debates such as that on the regulations governing margarine standards [17] do not, on the whole, show Parliament at its best, even though the Minister concerned was technically qualified in a way that is rarely the case. The avoidance of delegation is often no happier in results.[18] Reliance on parliamentary controls can be carried too far, particularly since they are not always used for what might be thought to be their primary purpose.[19] Indeed, that reliance can itself be dangerous. The under-estimation of the real limits of those methods of control creates a false sense of security. Concentration upon parliamentary methods of control may not only increase present difficulties of parliamentary time and labour, but also may hinder the development of alternative forms of control. The limitations imposed upon the Scrutiny Committee by its own terms of reference could have a more general application. Parliament is perhaps best at preventing an abuse of power, and then as a last resort. The right use of power is often best controlled elsewhere. While no one would commend as a general model the elaboration and expense which have preceded the report on the egg-marketing scheme,[19a] yet the proper development of ancillary control devices such as the inquiry and of consultation is nevertheless desirable. That development is unlikely to come about if such devices are regarded as a usurpation of parliamentary functions, or if the present practical limits to parliamentary control are not fully recognised. New difficulties call for new solutions. At present, many such devices are less openly and freely used than need be, because of this concern for existing methods of parliamentary control; yet the more open use might increase the acceptability of legislation, and allay suspicion.[20] Correspondingly, if the real limits of parliamentary control were emphasised other methods could be made more effective.[21]

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[13] s. 76 of the Law of Property Act, 1925, gives a vast and often unsuspected meaning to the words "beneficial owner," or see s. 39 of the Titles to Land Consolidation (Scotland) Act, 1868.

[14] Heating Appliances (Fireguards) Regulations, 1953 (S.I. 1953, No. 526).

[15] *Law and Orders* at pp. 229 and 230.

[16] *Op. cit.*, p. 181: There is perhaps inconsistency in the argument here and on p. 179 on this matter. The fact that old regulations are later incorporated into statute does not necessarily mean that they have become more intelligible or the House better able to understand them. It may merely be that the technicians outside the House are satisfied that the provisions have taken permanent shape.

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[17] H.C.Deb., Vol. 529, cols. 181–195. See too Mr. Iain Macleod introducing the National Health Service (Superannuation) Regulations, 1955, "It is said that however complicated the subject there is always at least one person in the House who understands it. . . . I put forward these regulations with some confidence as proof to the contrary." H.C. Deb., Vol. 544, col. 331.

[18] See, *e.g.*, the Debates on the Report and Third Reading stages of the Town and Country Planning Bill, 1954. H.L.Deb., Vol. 189, particularly cols. 1467 and 1493–1509. That measure was one which, on the whole, attempted to contain all the necessary provisions, but the avoidance of delegated legislation was not notably happy in result.

[19] On this matter also there is inconsistency in *Law and Orders*. At p. 146 it is asserted that Prayers are not used as an obstructionist device; pp. 187–188 give examples of their use as such. Apart from their use in political warfare these debates are, like those on the Estimates, often used for general purposes not the primary one. Thus the debate on the White Fish Authority General Levy (Amendment) Confirmatory Order, 1956, was really used to debate the decline of Hull as a port.

[19a] Nor is the high degree of formalisation of the rule-making process as in the American Federal Administrative Procedure Act always desirable or successful, see "The American Administrative Procedure Act" by Professor Louis L. Jaffe, *Public Law*, Vol. 1, p. 218.

In short, it is perhaps time that we should accept the respectability of, and necessity for, delegation, seeking to live with it rather than to fight against it. Toleration need not of course amount to an uncritical acceptance. Legislation in its original as in its delegated form has uses and dangers, and the latter must be recognised. It does not, however, follow that the safeguards in the case of the delegated form need be the same, or be operated in the same forum, as those to which we are accustomed in the case of the parent legislation. The acceptance of delegated legislation might well mean that we must seek to cultivate other safeguards operated elsewhere.

It is in regard to some methods of control that differences appear between Scotland and England, which affect the acceptance of parts of the views expressed in *Law and Orders*. As an example of detail, confirmation of by-laws by a sheriff rather than by a Ministry can be a substantial advantage,[22] but there are also differences of principle. It may be that it is only the accidental incidence of litigation which has in Scotland settled, in a restricted sense, the meaning of the phrase " as if enacted in the Act," whereas in England the issue is open with a balance of dicta in favour of that narrow view.[23] That distinction could, however, also be the consequence of a slightly different approach. There is perhaps a greater readiness on the part of the courts to retain and use power. In *Brierley* v. *Phillips* [24] it was clear that Lord Goddard C.J. strongly disliked the order before him. He condemned (at p. 543) " orders . . . which are couched in language open to all sorts of meanings . . . so that the persons to whom they apply cannot know whether they are acting legally or not unless possibly they get counsel's opinion or at least a solicitor's advice." Similar views were expressed, on a different order, by Lord Cooper in *Morrison* v. *Ross Taylor*.[25] Yet a difference of emphasis is apparent. The accused escaped in the first case by a process of interpretation and by the finding of a technical flaw in the summons. In the second the High Court of Justiciary held (by a majority) that a relevant charge could not be drawn at all under the order in question, and thus in effect struck down the order.

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[20] Thus it could remove doubts in the minds of Members (and of the public) like those expressed by Mr. John Edwards; referring to the instruments to be made under a Local Government Superannuation Bill, he said "It is quite impossible to discuss [the subject] without all the papers in the negotiations": H.C. Papers (1952–53), 310–311, Q. 694.

[21] Thus, for example, the degree of judicial scrutiny of delegated legislation may be strongly influenced by the fact of whether or not the order in question is subject to parliamentary scrutiny: see, *e.g.*, *Glasgow Insurance Committee* v. *Scottish Insurance Commissioners*, 1915 S.C. 504, 1 S.L.T. 217, *per* Lord Johnston; yet in view of the realities of parliamentary scrutiny it seems that the courts should not be unduly reticent in exercising their powers merely because the alternative scrutiny exists. Here it may be added that there is much more realism in *Amour* v. *Scottish Milk Marketing Board*, 1938 S.C. 465, S.L.T. 347, than in *Rowell* v. v. *Pratt* [1936] 2 K.B. 226, the principles of which were followed in *Marshall* v. *Scottish Milk Marketing Board*, 1956 S.C.(H.L.) 37, S.L.T. 162. The recognition of the "public" part played by such bodies in legislative activity is to be found in *Amour* but is glossed over by the House of Lords.

What are perhaps slight differences in that context become much greater when the treatment of administrative tribunals is considered. *Law and Orders* re-emphasises the limitations and difficulties of English law on that subject. "The forms of action we have buried, but they still rule us from their graves," wrote Maitland[26] when discussing private law. In English administrative law the forms of action still rule with the direct force of the living. The prerogative orders are in many respects designed for specific purposes. The necessity of being able to classify a decision as judicial or as quasi-judicial before certiorari will lie is an obvious example, but other orders are similarly affected.[27]

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[22] See, *e.g.*, the use of knowledge of the locality in *Burgh of Dunblane-Petrs.*, 1947 S.L.T.(Sh.Ct.) 27; here allowance must also be made for the considerations referred to in note 44, *infra*.

[23] *McEwen's Trustees* v. *Church of Scotland General Trustees*, 1940 S.L.T. 357. Contrast the summary of English law in Griffith and Street, *Principles of Administrative Law*, pp. 116–117.

[24] [1947] K.B. 541.

[25] 1948 J.C. 74 at 78, S.L.T. 257. Although this case has been overruled in *Marshall* v. *Clark*, 1957 J.C. 68, 1958 S.L.T. 19, this only concerns the particular result of *Morrison* v. *Ross-Taylor*, it does not affect the general approach, see *per* the Lord Justice-Clerk (Thomson) at p. 76.

The boundaries of alternative remedies are not clear.[28] Difficulties arise in part because forms of action originally intended for one purpose are distorted to achieve a somewhat different one, and as a result the emphasis tends to be upon form rather than substance.[28a] In Scotland, in contrast, there is in a sense a complete formlessness.[28b] General actions for an interdict or declarator or for reduction will serve a multitude of purposes. The real issue of legal power and of good faith is the concern of the court rather than the nature of decision. A decision of the sheriff, albeit an administrative one, is as much subject to reduction as a judicial act.[29] The contrast in the practical result of these procedural differences is most marked in cases such as *R.* v. *Central Professional Committee for Opticians, ex p. Brown*,[30] and *Hayman* v. *Lord Advocate*.[31] Both cases were concerned with the registration of ophthalmic opticians under the National Health Service Acts, and the regulations made thereunder; in both a disappointed applicant complained of his treatment by the professional committees responsible for advising the Ministers concerned. In the former case the Lord Chief Justice said of the committee at p. 521: "Under the regulations the committee are not to sit and hold a judicial or semi-judicial inquiry . . . in preparing themselves to give advice, they can seek what information they like and in any way they like." In the latter, although Lord Cooper analysed the function of the committee, finding, at p. 630, that "the practically effective decision . . . is thus the decision of the professional committee," he did not proceed to classify its actions as judicial or not; indeed Lord Keith's admission, at p. 636, of the possibility of delegation of functions could be regarded as inconsistent with a classification of the body as being judicial. Upon that finding, of the practical effect of the committee's decision, Lord Cooper held that allegations that the pursuers "had been deprived of their livelihood without reason assigned and without the opportunity of being heard" were relevant. In the one case the concern is with practical effects, in the other with questions of classification, with the result that in the one the possibility of a remedy is admitted, in the other it is denied.

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[26] *Forms of Action at Common Law*, p. 2.

[27] See, *e.g.*, *R.* v. *National Joint Council for the Craft of Dental Technicians* [1953] 1 Q.B. 704, involving both certiorari and prohibition.

[28] Thus the availability of a declaration in lieu of certiorari is discretionary and has also certain procedural differences which may affect rights in important ways.

[28a] Thus in *R.* v. *Minister of Agriculture, ex p. Benney* [1955] 2 Q.B. 140 at 166 Denning L.J. (as he then was) declared that the courts were taking technicalities because they could not deal with substance.

[28b] After the Union there was, too, a refusal to adopt the English rules of certiorari: see, *e.g.*, *Guthrie* v. *Cowan*, Dec. 10, 1807, F.C. Lord Belhaven in his celebrated speech before the Union had said, "I think I see our learned judges laying aside their Practiques and Decisions, studying the Common Law of England, gravelled with certioraries, *Nisi Prius* . . ." etc. Here, as elsewhere, his prophesies have been happily falsified.

[29] *Stirling* v. *Hutcheon* (1874) 1 R. 935.

[30] [1949] 2 All E.R. 519.

[31] 1951 S.C. 621, 1952 S.L.T. 209.

This difference of approach and consequential differences in result are observable elsewhere. In *R.* v. *Metropolitan Police Commissioner, ex p. Parker*[32] the classification of an act as administrative leads to the denial of any remedy by way of judicial review. In *Ex p. Fry*[33] the same result follows from the classification of procedures as being disciplinary. Yet in *Lockhart* v. *Irving*[34] the proceedings in question were those of a disciplinary inquiry. In substance a Chief Constable was to hold a disciplinary inquiry into charges which, although directly affecting other members of the force, also obliquely involved his own conduct. Two main reasons led Lord Robertson to grant an interdict against the continuation of the inquiry. "In my opinion," he said, at p. 569, "it is not only against justice to the officers and men concerned, but also against the public interest, that such investigation should proceed." The intervention of the court is founded here upon grounds of general principle irrespective of the particular classification of the tribunal. The procedure was plainly wrong in principle and therefore would be interdicted. The general principle was expressed by Lord President Inglis when he said "although we are precluded from reviewing the proceedings of the Presbytery, either on matters of substance or matters of form, if it can be made out to our satisfaction that some serious violation of the ordinary rules of procedure common to all courts of competent jurisdiction has occurred whereby injustice or inequity has resulted, then we may be entitled to interpose for the purpose of setting the matter right."[35] In carrying out this principle the Court of Session have been much more concerned with the questions of injustice and of impropriety than with retaining any narrow definition of a court. It was on the grounds of oppression that the court was prepared to control the decision of a School Board dismissing a master for fault,[36] which might be regarded as a judicial proceeding, but the obligation to hear all parties interested was also enforced where the proceedings were of an administrative nature.[37]

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[32] [1953] 1 W.L.R. 1150.

[33] [1954] 1 W.L.R. 730.

[34] 1936 S.L.T. 567.

There is indeed a long history of the control of inferior bodies in cases where for the purposes of control the court has not been concerned with the classification of proceedings but has nevertheless been concerned with right conduct.[38] Throughout the cases not only do the forms of action merge but the grounds of decision do so too. The observance or otherwise of rules of natural justice and the like is held to affect legal power, and so all cases tend to be decided upon loose grounds of *ultra vires.*[39] This is perhaps inevitable since there is running through the cases the theme that this control by the Court of Session must exist in order that wrongs may be righted,[40] and such a conception is inconsistent with governing control primarily by the classification of the decision. The blending of questions of competency and merits, to which Lord President Hope refers in *Ramsay's* case, is one of the consequences of such an approach, yet in itself it has the merit of giving flexibility to the law. It cannot be said that this judicial/administrative distinction has played no part. It can affect questions of expenses,[41] it can affect the forum, or the mode of control[42] and on occasion the decision.[43] At times, too, the classification of an act as administrative has meant that higher standards have been enforced. Thus the function of a sheriff in confirming alterations of burgh boundaries being administrative, he could not confirm simply on the grounds of no opposition but had to satisfy himself that the alteration was desirable.[44] Yet although in these cases classification is important, on the whole it cannot be said that classification has played the major part that it has in England.[45]

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[35] *Walker* v. *Presbytery of Arbroath* (1876) 3 R. 498 at 504 (reversed on grounds not affecting this principle (1876) 4 R.(H.L.) 1). "Inequity" could cover much, see, *e.g.*, *Dawson* v. *Allardyce*, Feb. 18, 1809, F.C.

[36] *Marshall* v. *School Board Ardrossan* (1879) 7 R. 359. Or earlier see *Hastie* v. *Campbell* (1769) Mor. 13132 or *Kempt* v. *Magistrates of Irvine*, Mor. 13136.

[37] *School Board of Lochgilphead* v. *School Board of S. Knapdale* (1877) 4 R. 389. There is no attempt to classify the decision of the Board of Education; Lord President Inglis simply affirms as a general principle: "Whatever may be the construction of the 9th section of the statute in other respects I am of opinion that in questions of the kind now before us, in which two parishes have adverse interests, the Board of Education are not within the powers conferred by this section if they determine the question without having both parishes represented" (at p. 391). Earlier see the case of the *Messengers of Edinburgh*, Elchies, tit. "Jurisdiction," No. 31.

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[38] See, *e.g.*, *Calder* v. *Learmonth* (1831) 9 S. 343. The decision of turnpike trustees to close a road had to be supported by proper procedures even though like decisions were firmly classed as ministerial rather than judicial in other contexts: *Love* v. *Lang* (1872) 10 M. 782 (a question of expenses in such a closure order); or see *Lewars* v. *Earl of Haddington* (1725) Mor. 7464.

[39] See, *e.g.*, *the School Board of Lochgilphead* referred to in n. 37 above, *Heritors of Corstorphine* v. *Ramsay*, March 10, 1812, F.C., or *Imray* v. *Deputy Lieutenants of Invernesshire*, March 2, 1811, F.C., and the cases there referred to, or *Earl of Roxburgh* v. *A Minister* (1663) Mor. 7328, an early case of the insistence on hearing both sides. More recently, *Stirling and Ferguson* v. *Hutcheon* (1874) 1 R. 935.

[40] This theme can be found often: see, *e.g.*, Kames, *Historical Law Tracts*, at p. 228, "No defect in the constitution of a State deserves greater reproach than the giving licence to wrong without affording redress. Upon this account, it is the province, one should imagine, of the sovereign and supreme court, to redress wrongs of every kind where a peculiar remedy is not provided. Under the cognisance of the privy council in Scotland came many injuries, which, by the abolition of that court, are left without any peculiar remedy; and the court of session have with reluctance been obliged to listen to complaints of various kinds that belonged properly to the privy council while it had a being. A new branch of jurisdiction has thus sprung up in the court of session which daily increasing by new matter will probably in time produce a general maxim." Lord Kames then proceeded to discuss instances of this judicial control of administrative acts; or see Lord Succoth in *Ramsay's* case (*supra*, n. 39). For later examples see *Ross* v. *Findlater* (1826) 4 S. 514 at 522, *per* Lord Pitmilly, or *Angus* v. *Jeffray*, 1909 S.C. 400, 1 S.L.T. 84, *per* Lord Justice-Clerk Macdonald. For a clear early use of the power, see *Collins* v. *High Judge of the High Court of Admiralty* (1781) Mor. 7451.

[41] *Love* v. *Lang* (1872) 10 M. 782; *Liddall* v. *Ballingry Parish Council*, 1908 S.C. 1082, 16 S.L.T. 258.

It is not here possible to examine exhaustively the topic of judicial review. Enough has been said to indicate that a somewhat different approach and different methods can materially affect the situation, and that the picture given in *Law and Orders* is not necessarily as true throughout the United Kingdom as it may be in England. These differences in background and result should be borne in mind. They can affect the acceptance of cases such as *Smith* v. *East Elloe R. D. C.*[46] as laying down general law. They certainly enable more flexibility in judicial control. Classification as judicial may induce too great rigidity, just as a different classification may, as has been shown, allow too much freedom. Under a more flexible procedure rules can be more accurately fitted to particular cases. The delegation of authority envisaged in *Hayman* v. *Lord Advocate*,[47] and some of the procedures which were regarded as permissible in *Moore* v. *Clyde Pilotage Authority*[48] become possible even though under the English cases they might be incompatible with the performance of judicial functions.

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[42] See *M'Tavish* v. *Commissioners of Caledonian Canal* (1876) 3 R. 412; *Davie* v. *Colinton Friendly Society* (1870) 9 M. 96; *Arcari* v. *Dunbartonshire County Council*, 1948 S.C. 62, S.L.T. 438; and *Ross-shire C. C.* v. *Macrae-Gilstrap*, 1930 S.C. 808, S.L.T. 587, and the cases therein referred to.

[43] *Ramsay* v. *McLaren*, 1936 S.L.T. 35.

[44] *Lindsay* v. *Magistrates of Leith* (1897) 24 R. 867.

[45] Thus Lord Kinnear's statement in *Moss's Empires* v. *Assessor of Glasgow*, 1917 S.C.(H.L.) 1, 1916 2 S.L.T. 215, is purely general: "Whenever any inferior tribunal or any administrative body has exceeded the powers conferred upon it by statute to the prejudice of the subject the jurisdiction of the court to set aside is not open to doubt." This statement is also widened by the view often taken of what is excess of power.

[46] [1956] A.C. 736.

[47] 1951 S.C. 621, 1952 S.L.T. 209.

[48] 1943 S.C. 457, 1944 S.L.T. 111.

Correspondingly the limits to the review of administrative acts have been determined by practical considerations.[48a] While these concessions to convenience can be made, they are made without concession of essentials. Thus it was the violation of rules of good conduct which was important in the particular case which caused the reduction of the decision of the appeal tribunal in *Barrs* v. *British Wool Marketing Board*,[49] even though under the English rules that tribunal was free from restraint as discharging administrative functions.[50] Perhaps even more important is an ability to regulate procedure in order to achieve another end, the real effectiveness of an inquiry. In *Franklin* v. *Minister of Town and Country Planning* [51] Lord Thankerton's determination of the nature of the public inquiry under the New Towns Act is well enough known. His conclusion, at p. 102, that " I am of opinion that no judicial duty is laid on the respondent in discharge of these statutory duties " (in relation to the inquiry) led him to assert, at p. 103, that " In such a case the only ground of challenge must be either that the respondent did not in fact consider the report and objections . . . or that his mind was so foreclosed that he gave no genuine consideration to them," and also to reject the contention that the inquiry was bad because no evidence was led by the Minister. Yet, in *Magistrates of Ayr* v. *Lord Advocate*,[52] where in essence the situation was similar, Lord Birnam found the inquiry wanting precisely because no evidence was led by the Secretary of State; without such evidence he found that the tribunal could not properly achieve its end, and he could not conceive that it was intended to be a mere echo of the general policy of the Secretary of State. Here once again the purpose of the tribunal is the primary consideration and rules enforcing judicial control are designed to assist that purpose; they are not derived from a classification of the tribunal's action.

[48a] *e.g.*, in *Guthrie* v. *Miller* (1827) 5 S. 711—as to lighting streets.

[49] 1957 S.C. 72, S.L.T. 153. It is true that here both the Lord President and Lord Sorn refer to the tribunal as a quasi-judicial one, or as performing judicial functions. The reason for so doing was to maintain the public credit of the tribunal in question and to achieve fairness to the parties. Once again it was a consideration of the consequences of decisions taken to individuals and to the public at large which opened up the way to judicial review.

[50] See the case of *Re Merricks*, Q.B.D., Oct. 9, 1950 (unreported), referred to in argument in *Barrs*.

[51] [1948] A.C. 87.

[52] 1950 S.C. 102, S.L.T. 257.

It may also be observed that in that case there was provision for a degree of independence of the person holding the inquiry. There was none in the New Towns Act, 1946, and the point was not taken that the inquiry was conducted by an Inspector of the Ministry of Town and Country Planning. Indeed, in view of the trend of English cases no such point could have been taken. In contrast it may however be noted that section 26 of the Agricultural Holdings (Scotland) Act, 1949, making provision for a hearing on confirmation of a notice to quit, also made no provision for a neutral person; yet in *University of Edinburgh* v. *Craik*[53] Lord Cooper himself raised the point that the Secretary of State had an oblique interest in the effectiveness of the notice to quit which was there in question, and added at p. 195: "I feel it my duty to say for the guidance of those concerned in any future cases of this kind that the inquiry in this case should have been taken by a wholly independent person, and then the utilisation of officials of the Department for the purpose in hand might well have led to a challenge of the proceedings. There are cases under other statutes and orders in which the infringement of the principle I have mentioned [that a man should not be a judge in his own cause] has been specifically authorised. But in this instance Parliament has left to the Minister a free hand in the selection of the person to be appointed and the choice in fact made in this case was, in my opinion, an unfortunate one." Here once again a different approach is noticeable, with the result that the freedom left by Parliament may be cut down in Parliament House, and the impression is left that judicial control is not always as weak in Scotland as it appears in *Law and Orders*.

Yet even if that impression be true, the large questions which provoked the writing of *Law and Orders* remain. They are those of the control of a modern State with its manifold activities. It may well be that in considering parliamentary or judicial controls discussion is focused on only a part of the real problem. At best judicial control is *post hoc*; it may itself be whittled away by undue respect for other institutions,[54] or if too strong it may bring its own difficulties, by leading the courts too far into the field of policy. The issue of judicial reticence is important, not only in the field of expression which Professor Sutherland has recently so ably discussed, but also in the field of substance. The growth of judicial control inevitably leads the courts into fields of policy just as procedural due process has, in the United States, led to substantive due process,[55] and the decision as to how great the incursion should be is not an easy one.[56] There are many who welcome the wider powers confirmed in *Glasgow Corporation* v. *Central Land Board*,[57] who are equally glad that in practice they will not be called upon to show the nice judgment which the exercise of those powers will entail. Apart from these questions judicial control is, if it may respectfully be thus described, something of a blunt instrument. It is often too cumbersome and too expensive to help in small cases of injustice or where the cost of litigation cannot be easily borne. It may be, too, that present procedural rules are not always as well suited to this type of litigation as to that between private parties. On the other hand, parliamentary and other preliminary safeguards have disadvantages and difficulties some of which have already been discussed. Whatever forms are developed they must of necessity be limited in scope, and if too rigid could well inhibit the necessary vitality of government. Moreover, no safeguards are incapable of evasion and all will tend to be regulated by the general morality of the society and governmental machinery in which they operate.

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[53] 1954 S.C. 190, S.L.T. 45.

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[54] Some instances of this have already been given (*ante*, n. 21); more recently the interpretation of what is a Parliamentary thing in *Harper* v. *Secretary of State for the Home Department* [1955] Ch. 238 might have surprised Holt C.J. and the House of Lords in *Ashby* v. *White* (1703) 2 Ld.Raym. 938.

[55] A process of evolution which in due course produced warnings such as those of Mr. Justice Stone in *U.S.* v. *Butler*, 297 U.S. 1, 87: "The courts are not the only agency of government that must be assumed to have capacity to govern."

[56] This difficulty may again be surmounted empirically, see "How much is Much too Much?" 19 M.L.R. 212.

[57] 1956 S.C.(H.L.) 1, S.L.T. 41.

In view of these difficulties it is possible that attention should be concentrated at least as much on the training of administrators as on methods of controlling them. The shortage of scientists may be acute but it is probable that the shortage of able and fit administrators is as grave [58] and can have as serious consequences for the community as the former. The society in which the scientist can work effectively is largely dependent on the administrators. There are perhaps rather more difficulties in overcoming the latter shortage simply because the essential training of the public administrator is not in knowledge but in character. The failings in the matter of Crichel Down were essentially moral failings and arose from a disregard of those standards of conduct towards individual citizens which were formerly taken for granted in the public service. It is in this training that the law schools can play a greater part. The study of law remains essentially a liberal and humane one because of the nature of the problems with which law is concerned. The respect for the individual which is essential to the good administrator can today perhaps be most easily gained through legal studies. The question " Who is my neighbour?" is one of constant importance to the lawyer. It has been posed most famously in the field of reparation, yet it is as important in what are apparently technical fields. The concept of obligations to fellow citizens had produced much of the jurisdiction of the Dean of Guild long before Town and Country Planning Acts were upon the Statute-books.[59] It is obvious that throughout all the branches of public law the problem of reconciling the claims of the public and the rights of the individual is of constant importance. In private law also it is often necessary to balance the rights of one against the interests of the many. At a certain point the rights of minority shareholders become dominant and claim protection. Problems of error, mistake or misrepresentation conceal within themselves moral issues just as much as does the problem of the scope of the duty of care. Their solution has required the balancing of the interests of the mercantile community in general against those of a particular owner. It cannot be said that such problems underlie all legal issues, yet the list of occasions when they do arise could grow long and their occurrence is sufficiently frequent for the lawyer to be impressed by this conflict of claims between the community and the individual and yet not to lose sight of the fact that each individual is the possessor of particular rights, whose claims need practical solution. The advantage of the law lies then in the fact that its study is more concrete than pure philosophic studies, yet it is also more moral than some other of the social sciences—to the economist the "neighbour" may merely be that firm which goes to the wall. Indeed, there ought, too, to be found in legal studies an insistence upon that which is right, rather than on that which is convenient. For would-be administrators, legal studies have, then, the advantage of involving steady consideration from many points of view of the principles and problems which underlie the whole discussion in *Law and Orders*. It may be that today the law schools in the universities may serve the needs of the community as much by the training they can give to administrators as they do by producing practising lawyers as keen to protect the individual as is Sir Carleton Kemp Allen. That other training may indeed be oblique and not specific. It could be merely the result of constant contact with that greatness which periodically, but remarkably often, makes itself apparent in the law reports. The achievement of this other purpose would impose no great burden on the law schools for, far from being incompatible, these two purposes in legal education are, in fact, only different aspects of the same broad purpose—the proper study of law.

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[58] See 90th Report of Civil Service Commissioners, 1956–57, which on this matter repeats earlier warnings. See also report of the Franks' Committee (Cmnd. 218), § 405: " We wish to emphasise that, whatever our recommendations under either part of our terms of reference may be, nothing can make up for a wrong approach to administrative activity by the administration's servants."

[59] See, *e.g.*, the emphasis on this aspect in Hume's *Lectures*, Vol. III, pp. 213 *et seq.*

J. D. B. MITCHELL.

THE PLACE OF THE QUASI-JUDICIAL DECISION IN SCOTS LAW

IN Scotland the term " quasi-judicial " does not seem to have received the measure of attention which it has enjoyed in England. This may mean that, our English brothers having said all that usefully can be said on the subject, we in Scotland are content to adopt their views on quasi-judicial functions as equally applicable on this side of the Border; but it should surprise no one if, true to the characteristic commonly held to be predominant in the Scot, a cautious survey of the term, its significance and its value as a concept in modern administrative law is undertaken before accepting it in the Scottish legal system. Indeed, the use of the prefix " quasi " in the designation of any concept brings little reassurance to a lawyer practising in these chill Caledonian airs; and, since the occasions on which the term has been used in authoritative pronouncements on Scots law are few and of comparatively recent date,[1] it may be pardonable if this importation from a neighbouring legal system is somewhat carefully examined before it is acknowledged with becoming expression of gratitude. The more elaborate references to quasi-judicial powers recently made by the Lord President[2] are an additional reason for detailed study of the term.

The most superficial survey of the subject reveals that the term " quasi-judicial " has been used with a variety of nuance. A false sense of security may be engendered by the definition contained in the Report of the Committee on

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[1] The earliest use of " quasi-judicial " in a judicial opinion in the Court of Session, so far as I have been able to discover, is in *Hayman* v. *Lord Advocate*, 1951 S.C. 621 *per* Lord Sorn (then Lord Ordinary), at pp. 627–628; 1952 S.L.T. 209. The late Lord Cooper used the term, without defining it, in 1929 in a paper entitled " The Limitations of the Judicial Functions of Public Authorities," *vide* his *Select Papers*, p. 28.

[2] *Barrs* v. *British Wool Marketing Board*, 1957 S.C. 72 at p. 81, S.L.T. 153 at p. 157.

Ministers' Powers,[3] where an analysis of executive powers in three categories, judicial, quasi-judicial and "purely administrative," is propounded, with a definition of each class of power. Tripartite division has, of course, the support of august authority; but this has not been of itself sufficient to save the Committee's analysis from some rather rough handling; and, although the classification and definition of powers in the Report have been judicially noticed by the English courts in terms of guarded approval,[4] they have never been generally adopted by the courts. Indeed, in *Franklin and Others* v. *Minister of Town and Country Planning* (the *Stevenage* case),[5] the terminology seems to have run riot. In the court of first instance, the Attorney-General's argument attempted to establish that the Minister's function was not quasi-judicial, but purely administrative. Henn Collins J., however, preferred to regard it as judicial.[6] The Court of Appeal differed from Henn Collins J. on the facts but expressed no difference of opinion on the law[7]; but the House of Lords, differing from Henn Collins J. on both the facts and the law, regarded the Minister's function as purely administrative.[8]

The exegesis of judicial, quasi-judicial and administrative powers contained in the Report of the Committee on Ministers' Powers has been so frequently commented upon that the reader may find it a vexation of the spirit to have it called again to his attention. Nevertheless, it lies at the root of so much of the thinking upon the problem of control of executive powers that an initial examination of its terms in some detail is unavoidable. The most frequently quoted passage in the Report is that which distinguishes a judicial decision from a quasi-judicial one, on the ground that a judicial decision will involve a *lis inter partes* accompanied by "(1) the presentation (not necessarily oral) of their case by the parties to the dispute: (2) if the dispute between them is a question of fact, the ascertainment of the facts by means of evidence adduced by the parties to the dispute and often with the assistance of argument by or on behalf of the parties on the evidence: (3) if the dispute between them is a question of law, the submission of legal argument by the parties: and (4) a decision which disposes of the whole matter by a finding upon the facts in dispute and an application of the law of the land to the facts so found, including where required a ruling upon any disputed question of law.

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[3] 1932 (Cmd. 4060), pp. 73–74, and p. 81.

[4] *Cooper* v. *Wilson* [1937] 2 K.B. 309, *per* Scott L.J. at p. 340.

[5] [1948] A.C. 87.

[6] [1947] 1 All E.R. 396 at p. 399.

[7] *Ibid.*, p. 612.

[8] [1948] A.C. 87.

" A quasi-judicial decision equally pre-supposes an existing dispute between two or more parties and involves (1) and (2), but does not necessarily involve (3), and never involves (4). The place of (4) is in fact taken by administrative action, the character of which is determined by the Minister's free choice." [9]

It is perhaps due to the detailed nature of this passage from the Report that it has tended to command most attention from writers on administrative law, whether or not they have found themselves in agreement with the Committee [10]; but it is not the last word of the Committee on the subject. If it were, it would be open to the criticism that it unduly emphasises the purely procedural aspects of the exercise of the power, or that it tends to treat " the quasi-judicial process as a judicial process from which one or more elements are missing, rather than as an administrative process to which one or more judicial elements are added." [11] Whether the solution be arrived at by subtraction or by addition, the distinction is too exclusively concerned with procedural matters unless, as Mr. Wade has pointed out,[12] it is read along with the further words of the Report explaining the quasi-judicial as " not judicial because it is governed, not by a statutory direction to him " (*i.e.*, the Minister) " to apply the law of the land to the facts and act accordingly, but by a statutory permission to use his discretion after he has ascertained the facts, and to be guided by considerations of public policy." [13]

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[9] 1932 (Cmd. 4060), pp. 73–74.

[10] See, for example, Robson, *Justice and Administrative Law* (3rd ed.), pp. 446–450; Griffiths and Street, *Principles of Administrative Law*, p. 140.

[11] H. W. R. Wade, "Quasi-Judicial and its Background," 10 *Cambridge Law Journal*, p. 227.

[12] *Op. cit.*, p. 227.

This further exposition of the quasi-judicial as distinct from the judicial leads on to the third branch of the analysis in which the Committee distinguish the administrative process from the judicial and quasi-judicial. "Decisions which are purely administrative stand on a wholly different footing from quasi-judicial as well as from judicial decisions and must be distinguished accordingly. . . . When a person resolves to act in a particular way, the mental step may be described as a 'decision.' Again, when a judge determines an issue of fact upon conflicting evidence, or a question of law upon forensic argument, he gives a 'decision.' But the two mental acts differ. In the case of the administrative decision, there is no legal obligation upon the person charged with the duty of reaching the decision to consider and weigh submissions and arguments, or to collate any evidence, or to solve any issue. The grounds upon which he acts, and the means which he takes to inform himself before acting, are left entirely to his discretion." [14]

The erudition of the members of the Committee on Ministers' Powers and the advantage which they enjoyed of hearing a great volume of evidence from those best qualified to pronounce authoritatively upon the issues involved would make one diffident in criticising the findings of the Report, were it not that the difficulty experienced by writers of authority on administrative law [15] reinforces the view that the basis of the analysis is not entirely satisfactory. If the classification is to be arrived at conceptually, then, apart altogether from the obvious difficulties of maintaining a clear dichotomy between "judicial" and "administrative" decisions,[16] what becomes of the finely drawn, mediate category of the quasi-judicial? It may be that a process, which insists upon " strict presentation of rival claims and proper ascertainment of evidence " yet ends only in an unfettered exercise of discretion, has its uses in ensuring that the discretion is not " exercised in ignorance or at random," [17] and that, since arbitrary exercise of discretion " is far more likely to be accidental than intentional, a procedure which satisfies natural justice is the best insurance against such accidents " [18]; but is anything gained by labelling an exercise of this kind quasi-judicial? Whether one views the quasi-judicial concept, with the Committee on Ministers' Powers and with Mr. Gordon, as a process " not exactly judicial " [19] or agrees with Mr. Wade [20] that it does not " stand outside the fundamental classification of judicial and administrative " but is an administrative decision " some stage or element of which possesses judicial characteristics," is it entirely satisfactory that so important an aspect of our administrative law as the principle of Natural Justice, should, in some cases at least, depend on tenuous distinctions of this kind?

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[13] 1932 (Cmd. 4060), p. 74.

[14] 1932 (Cmd. 4060), p. 81.

[15] See Griffiths and Street (*op. cit.*), pp. 142–144; Allen, *Law and Orders* (2nd ed.), pp. 388–394; Robson (*op. cit.*), pp. 446–448.

The objection does not appear to lie so much in the creation of this tenebrous realm between the " administrative " and the " judicial," or even in the ambiguity of the term " quasi-judicial," formidable though these difficulties may be. It lies rather in the attitude of mind which a pseudo-categorisation of this kind engenders; for the distinction suggests to us in the most persuasive way that there is in fact some ascertainable class of decisions which are quasi-judicial in nature. This may be so, but if it be conceded, it is remarkable how ill have fared the attempts of writers to define the limits of the class and how frequently they differ as to the general description of it. Thus, Mr. Gordon appears to accept a " conceptual " approach to Ministers' powers as sound and also to accept a tripartite categorisation. The quasi-judicial category, however, he considers to be not qualifiedly judicial, nor qualifiedly administrative, but wholly legislative in character. Where, after some sort of hearing, a Minister ultimately disposes of a question in dispute by a decision based upon a " discretion " (in the specialised sense in which the Committee have used the term), *i.e.*, upon policy or expediency rather than upon rules of law, Mr. Gordon regards the decision as creating rights and duties which did not previously exist, and therefore partaking of the nature of legislation.[21] Private legislation procedure is analogous since it provides for a hearing of parties, though it would not be suggested that in petitioning for a Bill or provisional order, or in opposing the grant of parliamentary powers, the parties are asserting any legal right to dictate the terms on which Parliament will legislate. The purpose of the procedure is persuasive, as is the purpose of objectors at an inquiry into objections. The decision in the one case as to what powers will be granted and in the other as to what order will be made or confirmed, is a discretionary one based on policy and expediency. Mr. Wade also appears to find value in the conceptual approach of the Committee's Report but, differing from Mr. Gordon, he assigns the quasi-judicial to the administrative sphere of activity, as a term descriptive of certain specialised types of administrative decisions which at some point exhibit judicial characteristics.[22] Sir Carleton Allen, who formerly adopted the conceptual approach, albeit " not completely satisfactory," as " an adequate working test,"[23] now departs from this view and suggests the new approach of declaring (by legislation) what issues are to be " justiciable " and by what means.[23a]

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[16] See D. M. Gordon, " Administrative Tribunals and the Courts " (1933) 49 *Law Quarterly Review*, 94, at pp. 105–106: " For the courts have constantly been assuming that judicial functions and administrative functions are antitheses and so mutually exclusive. In truth, administrative functions embrace judicial functions. Every tribunal administers; the only pertinent question is, what does it administer?"

[17] See Allen (*op. cit.*) (1st ed.), p. 72. In the recently published, and very welcome, second edition Sir Carleton Allen withdraws his qualified approval of what he describes as " the question-begging term 'quasi.' " (*Op. cit.* (2nd ed.), p. 390.)

[18] H. W. R. Wade, " Quasi-Judicial and its Background," 10 *Cambridge Law Journal*, p. 229.

[19] 1932 (Cmd. 4060), p. 73; D. M. Gordon, " Administrative Tribunals and the Courts " (1933) 49 *Law Quarterly Review*, p. 95.

[20] " Quasi-Judicial and its Background " (*supra cit.*), p. 227.

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[21] D. M. Gordon (*op. cit.*), p. 112.

[22] *Ante*, n. 20.

But even if it be conceded that, notwithstanding the difficulties of the term " quasi-judicial," it has its use in English law, to question whether it serves any useful purpose in Scots law is not merely disputatious. In the context of the English system the extent to which a decision of the executive power may be regarded as " judicial " (*i.e.*, may be assimilated by analogy to the decision of an inferior court) has an important bearing upon the procedure by which the citizen who is adversely affected may seek to have it reviewed by the courts; and the English courts have developed the use of the old prerogative writs (now, since the passing of the Administration of Justice (Miscellaneous Provisions) Act, 1938,[24] prerogative orders) of certiorari and prohibition as a means of controlling the decisions of modern " administrative " bodies, by characterising such decisions as judicial or quasi-judicial. " Judicial," in this sense, connotes that the body whose decision is under review is regarded as seised of an inferior jurisdiction.[25] In many cases, the deciding body is not, of course, a court in the true and full sense of the word, but the English judges have extended the orders of certiorari and prohibition to cover such decisions because they are regarded as similar, or analogous, to the decisions of an inferior court.[26] The problem of determining whether an executive body has the duty of acting " in a judicial way "[27] in coming to a decision is, of course, common to both English and Scottish courts. While the easy generalisation that, in contra-distinction to Scots law, English law makes the right depend upon the remedy is trite enough to be suspect, it is possible that English law has been forced into a somewhat laboured and technical approach to the control of executive decisions through the necessity of fitting them on frequent occasions into the existing framework of the prerogative orders. The need for an " adequate working test " for such a purpose needs no emphasis, but it is a need inspired by conditions which have no counterpart in Scots law.

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[23] *Law and Orders* (1st ed.), p. 73.

[23a] *Ibid.*, (2nd ed.), p. 396.

[24] ss. 9 and 10.

[25] *R.* v. *Local Government Board* (1882) 10 Q.B.D. 309, *per* Brett J., at p. 321; *R.* v. *Woodhouse* [1906] 2 K.B. 501, *per* Fletcher Moulton L.J., at p. 535; *R.* v. *Electricity Commissioners* [1924] 1 K.B. 171, *per* Atkin L.J., at p. 205.

[26] For example, a licensing " court "—*R.* v. *Brighton Justices, ex p. Jarvis* [1954] 1 W.L.R. 203—or the decision of the Minister of Health in confirming a " slum clearance " order: *R.* v. *Minister of Health, ex p. Davis* [1929] 1 K.B. 619.

[27] *Goodall* v. *Bilsland and Others*, 1909 S.C. 1152, *per* Lord Dunedin, at p. 1179, 1 S.L.T. 376.

Even in England, however, the " quasi-judicial " class of power has been treated with some reserve by the judges. " I do not like it," said Swift J. forthrightly.[28] Lord Greene M.R. described it as " an expression well adapted to mislead unless the context in which it is used is kept closely and accurately in mind." [29] More recently, the dangers attendant upon the pseudo-conception of the quasi-judicial have been strongly voiced by Lord Somervell of Harrow.[30] The term, he states, suggests that there is a well-marked category of activities to which certain judicial requirements attach, but an examination of the cases does not bear this out.

The dictum of Lord Somervell of Harrow is one which must be fervently endorsed by anyone seeking to find any exact content and meaning for the term. Far from discovering any well-marked category, one is bewildered by the variety of meanings attributed to it. A strict application of the definition in the Report of the Committee on Ministers' Powers would place within the quasi-judicial category those administrative decisions which presuppose the existence of a dispute between two or more parties and in which, after some sort of hearing, the decision is reached, not objectively, but upon a subjective discretion based upon considerations of policy and expediency. Tribunals, set up under statute or otherwise, to decide objectively questions of fact, or questions of law (usually the general injunctions of the statute or order under which the tribunal is created) would fall within not the quasi-judicial but the judicial category. This, I think, would be the view of Mr. Wade and probably also of Mr. Gordon; yet many American writers refer to administrative tribunals which are entrusted with a duty of reaching an objective decision on fact or law as quasi-judicial.[31] In the *Stevenage* case noticed earlier[32] a procedure exhibiting the characteristics ascribed by the Committee to the quasi-judicial was treated by the judge of first instance as judicial and by the House of Lords as "purely administrative."

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[28] *Marriott* v. *Minister of Health* (1936) 105 L.J.(K.B.) 125 at p. 129.

[29] *Robinson* v. *Minister of Town and Country Planning* [1947] K.B. 702 at p. 715.

[30] *Vine* v. *National Dock Labour Board* [1957] 2 W.L.R. 106 at p. 121.

If one views the problem unhampered by any allegiance to the prerogative orders, it becomes difficult to find any compelling reason for the existence of the intermediate category of the quasi-judicial. Apart from the requirements of these orders, the question becomes one of deciding whether a particular decision of the executive is purely administrative and therefore untrammelled and subjective or whether it must be reached objectively and in a judicial spirit. The use of the term "quasi-judicial" in that context can serve only to distinguish a tribunal or a statutory jurisdiction of some administrative agency from a court of law properly so called. The term might, it is true, have some claim to precision and even helpfulness if it could be so employed without overtones, though in some quarters this might be regarded as another instance of unprogressive and illiberal legalism; but one is forced to the conclusion that it has now become so loaded with the implications of conceptual exegesis, that its use in any restricted sense will cause rather than cure confusion.

It is not surprising that this should be so: for, when we attempt to categorise any function as "judicial," conceptually, we employ a term of shifting meaning. The ambiguity is present not only in every-day use of the word but also in legal discussion. Thus, it has been pointed out,[33] the word " judicial " does not have one meaning in all the contexts in which its import requires to be determined. Its meaning is not one and the same when, for example, the courts are applying the rule of absolute privilege for the statements of judge, counsel and witnesses in " judicial " proceedings,[34] and when they determine that an authority is " judicial " for the purpose of applying the requirements of natural justice to its proceedings.[35]

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[31] *Vide* Wade (*op. cit.*), p. 231: "In America 'quasi-judicial' decisions appear to be judicial decisions taken by administrative agencies."

[32] *Ante*, notes 5 to 8.

When an over-worked term such as " judicial " is called in aid of a conceptual theory of powers, there is a natural revolt against applying the word to activities so far removed from the sphere of the " judicial " (as the term is used in other contexts) as those of, let us say, a licensing " court " or a public inquiry into objections to a proposed order: hence the creation of the quasi-judicial territory to which such activities may be assigned without undue violence being done to the term " judicial "; but the immediate consequence of underpinning the conceptual structure with the pseudo-conception of the quasi-judicial makes it even more baffling to integrate the component parts of the structure. Thus, while the Report of the Committee on Ministers' Powers gives every appearance of containing the quasi-judicial within strict limits, these limits tend to be lost when the term is used by the courts. " The word ' quasi-judicial ' again leads to a temptation to import into the area which that expression covers conceptions which are very suitable to the conduct of an ordinary piece of litigation, but which are quite unsuitable to the performance of the acts which have been entrusted to the Minister by Parliament." [36] The departure from any conceptual thinking about the quasi-judicial category of decisions may also be seen in Lord

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[33] Griffiths and Street (*op. cit.*), pp. 142–143.

[34] *Royal Aquarium and Summer and Winter Garden Society* v. *Parkinson* [1892] 1 Q.B. 431.

[35] *Goodall* v. *Bilsland and Others*, 1909 S.C. 1152, 1 S.L.T. 376.

[36] *Johnson & Co. (Builders) Ltd.* v. *Minister of Health* [1947] 2 All E.R. 395, *per* Lord Greene M.R., at p. 400.

Thankerton's opinion in the *Stevenage* case,[37] where he refers to " those who are commonly regarded as holding a quasi-judicial office, such as an arbitrator." It is perhaps significant that the Lord President, Lord Clyde, in *Barrs* v. *British Wool Marketing Board*,[38] after describing the appeal tribunal set up by the Board as " a separate and independent body of a quasi-judicial character and quasi-judicial powers," goes on later to equate the tribunal's proceedings to those decided " in reference to arbitrations which are at least as much judicial proceedings as those of this tribunal."

The appeal tribunal in *Barrs*' case was established to hear appeals by wool producers against the value placed on their wool by the Board's appraisers. Its duty was therefore to decide objectively a question of fact, namely the value of the parcel of wool concerned; and according to the conceptual classification of the Report of the Committee on Ministers' Powers, the appeal tribunal acts judicially, not quasi-judicially, since no question of policy or expediency need enter into its decision. Mr. Wade[39] has no doubt that an arbitrator acts judicially, not quasi-judicially. " He has no concern with executive policy, and his task is to find facts and dispense justice to the parties in an entirely objective manner."

It is true that judges are not in any way bound to use the term quasi-judicial in the conceptual sense, or if they do, to adopt the definition of the Committee: but if they use the term conceptually and do not use it in the sense in which it is used by the Committee, it would be reasonable to expect an exposition of the concept which the judges understand by the term. No such exposition (or at least none differing from the Committee's Report) appears in any reported decision. If the term is not used by judges conceptually what is the purpose (apart from the specialities of English law already noticed) in using it at all? Can it be claimed that the importation of the term to Scotland adds anything of value to Lord Dunedin's words in *Goodall* v. *Bilsland and Others*?[40]

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[37] [1948] A.C. 87 at p. 103.

[38] 1957 S.C. 72 at p. 81, S.L.T. 153 at p. 157.

[39] " Quasi-Judicial and its Background," 10 *Cambridge Law Journal*, 216 at p. 227.

For the use of the quasi-judicial has brought other ills in its train beyond the frustration of its semantics. Its use seems to have been extended in England from its original purpose of subjecting the " quasi-judicial " power to the prerogative orders of certiorari and prohibition to the further and wider purpose of testing whether a decision should have been arrived at in accordance with " Natural Justice." There is, of course, an affinity between these two purposes but they are not necessarily co-extensive. In this intrusion of conceptual theory in the sphere of Natural Justice, Mr. Wade has already detected cause of uneasiness.[41]

The prerequisite of the existence of a *lis inter partes* in the conceptual view of quasi-judicial decisions is an appanage which can by itself cause confusion. The notion of a *lis inter partes*, with its suggested analogy to disputes before courts of law—" ordinary pieces of litigation," to use Lord Greene's expression—tends to foster the view that the application of the rules of Natural Justice to any proceedings depends upon the resulting decision being assignable to the judicial or quasi-judicial categories. Where a broad approach is taken and an attempt is made to determine when the authority must act in a judicial way, the criterion, though possibly imprecise, is at least free from some of the ineluctable difficulties which attend a rigid conceptual approach; and this is particularly true of the quasi-judicial decision; for, although the Committee's definition of the quasi-judicial presupposes the existence of a *lis inter partes*, there is no true *lis* in the proceedings before a licensing

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[40] 1909 S.C. 1152 at p. 1179, 1 S.L.T. 376: " The expression ' court ' does not turn it into anything else than it was before, namely a licensing tribunal. None the less, of course, parties who are there have got to conduct matters in a judicial way and not against all rules of judicial fairness."

[41] " The Twilight of Natural Justice," 67 *Law Quarterly Review*, p. 105.

"court,"[42] or before an inquiry into objections to a proposed order.[43] Parties appearing in such proceedings are not asserting or defending "rights." The most which they can urge upon the attention of the licensing "court" or of the person holding the inquiry is material tending to persuade in the former case the "court" to grant or to withhold a privilege, namely the licence, and in the latter the Minister to give due weight to the impact upon the interests of the objectors of the proposed order.[44] In neither case is there any real analogy with the proceedings in a court of law, a fact which some have recognised by describing the *lis* involved in quasi-judicial proceedings as a "quasi-*lis*."[45]

There is at least a danger that conceptual thinking in terms of judicial and quasi-judicial may detract from a wide view of the application of the rules of Natural Justice to decisions of the Executive. Possibly this narrowing of the field is what has led some to contend that what should be looked at in applying the rules of Natural Justice is not the nature of the proceedings but their effect upon the individual, though more probably the suggestion is inspired by a study of Continental systems of administrative law. The danger is that the rules of Natural Justice become too closely identified with the concepts of the judicial and the quasi-judicial. In the latter context attention has been focused on the maxim *audiatur et altera pars* and the application of Natural Justice to quasi-judicial proceedings has tended to be discussed almost exclusively in relation to the right to a hearing. But there is another element in the doctrine of Natural Justice—the rule against bias. This rule is frequently found to be inapplicable in typical quasi-judicial proceedings (as the Committee would regard them) because, in order to have bias on the part of the deciding authority, he must incline unduly to favour one of two or more views urged upon him by the contesting parties: but in deciding to make a proposed order after an inquiry has been held into objections, the Minister is often deciding between the furtherance of his own views on policy and the hardship caused to the objector. To speak of him as "biased" because the proposed order is one in which he himself has an interest, is to complain that he is acting in circumstances in which Parliament has envisaged his acting. It is precisely because he has an interest in carrying his policy into effect that Parliament has entrusted the discretionary power of decision to him.[45a] Where bias is alleged in such circumstances (as for example, in the *Stevenage* case) the courts have had no difficulty in finding that bias cannot be established by pointing to the Minister's interest in the order[46]: but if the case is presented upon conceptual arguments that the decision is a quasi-judicial one, the refusal to admit bias as a ground of challenging the decision has repercussions. Bias is one of the elements struck at by the doctrine of Natural Justice: but if the decision be a quasi-judicial one, then the doctrine of Natural Justice applies to it. The doctrine of Natural Justice cannot apply if one of its elements is inapplicable. Hence the decision is not a quasi-judicial one and the objector finds that his right to object is merely the right to fulminate.[47]

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[42] *Boulter* v. *Justices of Kent* [1897] A.C. 556, *per* Lord Herschell, at p. 569; *Lundie* v. *Magistrates of Falkirk* (1890) 18 R. 60, *per* Inglis L.P., at p. 65.

[43] *Franklin and Others* v. *Minister of Town and Country Planning* [1948] A.C. 87.

[44] *Vide* Robson, *Justice and Administrative Law* (3rd ed.), p. 407: "The mind of the authority is not to enjoy an unlimited freedom to decide howsoever it thinks fit, nor is it to be bound in advance to decide in a particular fashion. There is to be an element of balance in the decision which in some way we associate inevitably with the judicial spirit."

[45] See, for instance, Report of the Committee on Administrative Tribunals and Inquiries (the "Franks Committee") (1957) Cmnd. 218, para. 265; *Johnson & Co.* v. *Minister of Health* [1947] 2 All E.R. 395, *per* Cohen L.J., at p. 405, cited Allen, *Law and Orders* (2nd ed.), p. 390, *sub voce* "The Ghost Land of the Quasi."

If, after this protracted survey, the quasi-judicial is evaluated in reference to Scots law, it appears that the term serves no useful purpose in that legal system either (a) as to the type of remedy available to the citizen adversely affected by the decision in question, or (b) as a guide to the proper circumstances in which the rules of Natural Justice must be observed. On the latter point, Lord Somervell of Harrow[48] observed, " The court has to consider whether a Minister, tribunal or board has to act ' judicially ' in some respect and has failed to do so. The respect in which he has to observe judicial procedure will depend on the statutory or other provisions under which the matter arises." This eschewal of conceptual thinking upon judicial and quasi-judicial powers closely approaches the attitude hitherto adopted by the Scottish courts to such problems. It is the approach adopted by Lord Birnam in *Secretary of State for Scotland* v. *Burgh of Ayr*[49] and by the court in *Hayman* v. *Lord Advocate*[50] and in *Barrs* v. *British Wool Marketing Board.*[51] In the two last-mentioned cases, the appearance of the term " quasi-judicial " has in no way done violence to that approach, and it is not criticised on any other ground than that in it there is introduced into Scots law a term of no clear significance, and of uneasy history for which there appears to be no necessity in our legal system.

[45a] The difficulty is noted, but (it is submitted with respect) not satisfactorily disposed of in the Report of the Committee on Ministers' Powers (*supra cit.*), p. 79.

[46] *Franklin and Others* v. *Minister of Town and Country Planning* [1948] A.C. 87, *per* Lord Thankerton, at p. 103.

[47] For an interesting study of the interaction of the conceptual theory upon the doctrine of Natural Justice, see Galeotti, *The Judicial Control of Public Authorities in England and Italy*, pp. 164–180.

Its introduction is particularly unwelcome at a stage when English lawyers appear to be at last shaking off the trammels of the conceptualists and when the recently published Report of the Committee on Administrative Tribunals and Enquiries[52] has, with a refreshing air of realism, discarded the shibboleths of judicial, quasi-judicial and administrative and has addressed itself directly " to the task of finding a reasonable balance between the conflicting interests."

J. Bennett Miller.

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[48] *Vine* v. *National Dock Labour Board* [1957] 2 W.L.R. 106 at p. 121.

[49] 1950 S.C. 102, S.L.T. 257.

[50] 1951 S.C. 621, 1952 S.L.T. 209.

[51] 1957 S.C. 72, S.L.T. 153.

[52] (1957) Cmnd. 218, para. 276.

CASES AND COMMENT

1. SCOTTISH CASES

DIVORCE—is A.I.D. adultery?

The case which has attracted most attention in recent months has, of course, been *Maclennan* v. *Maclennan*, 1958 S.L.T. 12. H raised an action of divorce against W on the ground of adultery, founding on the fact of non-access for fourteen months prior to W's having given birth to a child. W admitted these averments, and hence a prima facie inference of adultery seemed irresistible. But W went on to explain that the child had been conceived by artificial insemination by a donor. Lord Wheatley repelled the husband's plea to the relevancy of this defence and held that A.I.D. does *not* constitute adultery by Scots law. His Lordship's view was, in brief, that sexual trafficking between two persons physically present is of the essence of adultery, and that impregnation *aliunde* does not constitute sexual intercourse nor, accordingly, adultery. On that basis he held that proof of the fact of the artificial insemination would rebut the primary inference of adultery. Unfortunately the decision seems contrary to common sense and common moral views and cannot be accepted as satisfactory. In the first place most of the authorities relied on date from a time when artificial insemination of the human female had not been thought of, so that their definitions of adultery were framed entirely in terms of the normal mode of committing that sin and matrimonial offence. Secondly, so far as appears from the report available, insufficient reference was made to other sources of information. The unreported American case of *Doornbos* was referred to, where A.I.D. was held adulterous, but not the valuable contributions on the subject in the periodicals, as in 70 S.A.L.J. 375 and 34 Can.Bar Rev. 1, in the latter of which Dean Tallin concluded from an exhaustive examination of the cases that A.I.D. *was* adulterous, even if the husband consented. The Archbishop of Canterbury's committee, appointed in 1945, recommended similarly in 1948, while the Royal Commission on Marriage and Divorce, paras. 72–73, 90, recommended that A.I.D. should be made a new ground of divorce as being a matrimonial offence as grave as adultery.

The best authorities in favour of his Lordship's view are probably *R. E. L.* v. *E. L.* [1949] P. 211, where Pearce J. held that artificial insemination by the *husband* resulting in the birth of a child did not amount to consummation of the marriage, and *Clark* v. *Clark* (1943) L.J. 41, where Pilcher J. held that a child conceived by fecundation *ab extra* by the *husband* did not amount to consummation of the marriage. But in each of these cases the point in issue was consummation and full intercourse, which obviously must involve actual *conjunctio corporum*. Fecundation can be no more than evidential of this. As against these there is the *obiter dictum* of Lord Dunedin in *Russell* v. *Russell* [1924] A.C. 687, 721 that "fecundation *ab extra* is, I doubt not, adultery."

There seems to be no illogicality in saying that *coitus* with another man is adultery, that *coitus* with another man and consequential fecundation *naturali modo* is adultery, and that fecundation *ab extra* by another man is adultery, though fecundation *ab extra* by the husband does not consummate the marriage. In A.I.D. a medical instrument simply replaces the male organ of the natural process.

Nor, with respect, is His Lordship's discussion of the implications of holding A.I.D. to be adultery entirely satisfactory. He suggested that if the seed were obtained from a donor who died before insemination of the woman took place she would be guilty of necrophilism. This seems to be pressing logic to excessive lengths and extending that concept unreasonably to avoid extending the concept of adultery.

It is very unfortunate that, in the result, the defences had to be repelled as lacking in specification and the case sent to the undefended roll, so that the solution to this interesting legal problem is not likely to be obtained in this case. It has since been heard as an undefended case and decree granted. When circumstances arise, it is thought that this decision will require reconsideration. Is the essence of adultery not simply such sexual infidelity as constitutes a breach of the marriage obligation, constituted normally by sexual intercourse with another, but equally possibly today by fecundation by another (by A.I.D.)? At least in England the courts have included in adultery conduct short of actual sexual penetration, as in *Sapsford* [1954] P. 394 and *Thompson* [1938] P. 162. This decision is not convincing.

D. M. W.

REPARATION—Vicarious liability.

Webb v. *Inglis*, 1958 S.L.T.(Notes) 8, is an interesting pendant to the well-known rule of *Harper* v. *Harper*, 1929 S.C. 220, S.L.T. 187, that husband and wife may not litigate *inter se* for damages for injuries caused *ex delicto*. In *Webb* the wife was injured by the husband's negligent driving and sued the husband's employers on the ground of their vicarious liability for him. The case accordingly raises the issue whether vicarious liability is liability for some act or omission on the employer's part or is merely a device for transferring the burden of damages for the employee's act or omission. Lord Wheatley took the same line as was taken in *Broom* v. *Morgan* [1953] 1 Q.B. 597, adopted the first view, and hence held that the wife could sue. This tends to reinforce the view that vicarious liability is not merely a social device for shifting the burden of insurance and damages but the imposition of liability for having a servant who commits an act or omission of negligence.

D. M. W.

EVIDENCE—corroboration.

A point of evidence was elucidated in *Stewart* v. *Glasgow Corporation*, 1958 S.L.T.(Notes) 4. The *de quo* was the state of a clothes-pole in a tenement back court. One expert said that it must have been manifestly corroded and dangerous for at least six months. On this he was not cross-examined. A second witness gave a corroborative opinion, on the basis that the condition of the pole had been accurately described by the first witness. The court held that this was not adequate corroboration, and that the absence of cross-examination did not relieve the pursuer from the onus of corroborating the first witness, since the condition of the pole was crucial to the pursuer's case. Lord Carmont dissented, holding, with the Lord Ordinary, that the absence of cross-examination on the condition of the pole rendered corroboration of that evidence unnecessary, but that corroboration was necessary of the inferences to be drawn from the facts, since that point had been challenged. This seems a satisfactory view and it is undeniable that to repeat evidence of matter not challenged, simply to corroborate it, would tend to lengthen proofs unreasonably.

D. M. W.

MARRIAGE CONTRACT—reduction—undue influence.

Forbes v. *Forbes' Trs.*, 1957 S.L.T. 346, is important for the distinction drawn between "undue influence" in Scots and in English law. It has too often been thought that the phrase has the same signification in both systems, a fallacy clearly exposed by Winder in 56 L.Q.R. 97. The pursuer's case failed on misrepresentation, also on error, and the only real dispute was whether the facts proved amounted to "undue influence." The fact that the pursuer signed the marriage contract in reliance on her father's advice would, in English law, have raised a presumption of "undue influence": *Bullock* v. *Lloyds Bank, Ltd.* [1955] Ch. 317; Snell's *Equity* (24th ed.), 507. But in Scots law it must be shown that a person in a fiduciary or quasi-fiduciary position had allowed self-interest to deflect his advice, and there is no presumption. This decision is very much to be welcomed as reinforcing a distinction not always observed. It is unfortunate that Lord Guthrie did not expressly make the point that English law on this matter is quite different and English decisions a most unreliable guide, though that probably appears sufficiently from the tenor of the judgment.

D. M. W.

2. ENGLISH CASES

NEGLIGENCE—Defective plant—Negligent manufacture.

The decision of the Court of Appeal in *Davie* v. *New Merton Board Mills, Ltd.* [1958] 2 W.L.R. 21 has now reversed that of Ashworth J. and is of some importance owing to the court's refusal to follow the Scottish case of *Donnelly* v. *Glasgow Corporation*, 1953 S.C. 107. It will be recollected that it was held in *Donnelly* that in a question with their servants, employers cannot escape liability for having provided defective plant by blaming its manufacturers. In *Davie* the facts were that a maintenance fitter was knocking out a metal key by means of a drift and hammer when, at the second blow of the hammer, a particle of metal flew off the head of the drift and into his eye, causing injuries. The drift, which had been provided for the plaintiff's use by his employers, although apparently in good condition, was of excessive hardness, and was, in the circumstances, a dangerous tool; it had been negligently manufactured by reputable makers, who had sold it to a reputable firm of suppliers who, in turn, had sold it to the employers, whose system of maintenance and inspection was not at fault. The plaintiff claimed damages for negligence against his employers on the ground that they had supplied him with a defective tool. The Court of Appeal (Devlin L.J. dissenting) has now held that the employers, being under a duty to take reasonable care to provide a reasonably safe tool, had discharged that duty by buying from a reputable source a tool whose latent defect they had no means of discovering.

The question the court had to decide was the employer's liability in respect of a defective tool bought by them without negligence from a reputable supplier who without negligence had bought it from a reputable manufacturer, who *was* guilty of negligence in its manufacture. Both Parker and Pearce L.JJ. considered that the cases establishing that employers, or invitors, could not free themselves from personal duties by entrusting them to competent agents or contractors were not really in point; see *Wilsons and Clyde Coal Co.* v. *English*, 1937 S.L.T. 523 and *Thomson* v. *Cremin*, 1956 S.L.T. 357. Nor even the case of *Paine* v. *Colne Valley Supply Co., Ltd.*, 55 T.L.R. 181, where an article was specially made by a manufacturer to the employer's requirements. Here there was no contractual relationship between the employer and manufacturers, and no amount of reasonable care on the part of the employer would have discovered the defect. In his strong dissenting judgment Devlin L.J. said this did not matter and that it would be an intolerable refinement to distinguish for this purpose between tools made by a manufacturer to the order of the employer and tools bought by the employer ready made. It was the employer who provided the tool and he must answer for its defects. The duty remained one of reasonable care, but the obligation to take that degree of care *per se* or *per alios* was an absolute obligation which the manufacturers had failed to fulfil, as they could have discovered the defect. As the Lord Justice-Clerk said in *Donnelly* v. *Glasgow Corporation*, " the supplier and the master are one. If then the supplier erred, the master is saddled with the results of that error."

The point is a narrow one that will eventually require to be resolved by the House of Lords.

W. A. E.

DAMAGES—Novus actus interveniens—Suicide after personal injuries.

In *Pigney* v. *Pointer's Transport Services, Ltd.* [1957] 1 W.L.R. 1121 a widow continued an action brought by her deceased husband against his employers on the ground of their negligence. In July, 1955, the husband had sustained head injuries as a result of an accident in the course of his employment, and shortly thereafter instituted proceedings against his employers. Before his action came into court, however, he committed suicide as the result of neurosis induced by his injuries. The widow continued the action under the provisions of the Law Reform (Miscellaneous Provisions) Act, 1934, and under the Fatal Accidents Acts, 1846–1908. Pilcher J., applying *Re Polemis* [1921] 3 K.B. 560, held that the damage which the widow had sustained was directly traceable to the negligent act of the defendants. He also held that it was against public policy to allow the personal representative of a suicide to succeed in a derivative claim under the 1934 Act, but it was not against public policy to allow a widow of a suicide to prosecute a statutory cause of action under the Fatal Accidents Acts, since no benefit accrued thereby to the estate of the deceased. It would seem that a claim in Scotland to continue an action *qua* executrix of a suicide would meet with no difficulty seeing that suicide is not a crime in Scotland. But the invocation of *Re Polemis* is a more difficult question, and in the recent case of *Cowan and Others* v. *National Coal Board*, January 31, 1958 (1958 S.L.T. Notes 19), Lord Cameron *inter alia* decided that as *Polemis* was not part of the law of Scotland and the deceased's suicide resulting from his injuries was not a reasonably foreseeable consequence, damages could not be recovered in respect of the said suicide.

SAFE MEANS OF ACCESS—Regulation 5 of the Building (Safety, Health and Welfare) Regulations, 1948.

In *Trott* v. *W. E. Smith (Erectors), Ltd.* [1957] 1 W.L.R. 1154 the facts were that an experienced steel erector, while proceeding to his place of work, fell to the ground from a substantial height and sustained fatal injuries. It was proved that boards could have been laid for walking on across the " trimmers " or cross members of the channels on which the deceased had been walking to his work. It was clear that the channels would have been a dangerous means of access to the ordinary person, but the defendants argued that the means of access were safe for a steel erector who was accustomed to heights and to keeping his balance on narrow surfaces far from the ground. Evidence was also led that there had never been a similar accident before on the defendant's premises. The Court of Appeal, affirming the decision of the trial judge, held that notwithstanding that the deceased was an experienced man accustomed to walking along structures of this kind, the defendants had failed to provide " sufficient safe means of access " so as to satisfy the requirements of regulation 5. As Parker L.J. observed, a means of access was not " safe " within the regulation if it was a possible cause of injury to anybody acting in a way that a human being may be reasonably expected to act in circumstances which may reasonably be expected to occur. Jenkins L.J. also emphasised that compliance with the regulation involved a stricter obligation than that incumbent upon employers at common law.

W. A. E.

MURDER—Diminished responsibility.

English judges now have the advantage over their Scottish counterparts in being able to charge a jury on diminished responsibility merely by reading section 2 (1) of the Homicide Act, 1957. This introduces into English law the Scottish law of diminished responsibility, but in the following terms : " Where any person kills or is a party to the killing of another, he shall not be convicted of murder if he was suffering from such abnormality of mind (whether arising from a condition of arrested or retarded development of mind or any inherent causes or induced by disease or injury) as substantially impaired his mental responsibility for his acts and omissions in doing or being a party to the killing." The phrasing of this section does not seem to have been taken from any Scottish decision on diminished responsibility. In the course of his opinion in the recent case of *Regina* v. *Spriggs* [1958] 2 W.L.R. 162, Lord Goddard C.J. referred to several Scottish cases and observed that Scottish judges had always found it a difficult matter to explain to the jury and a difficult matter for the jury to understand exactly what diminished responsibility meant. Now the English judge can fulfil his duty merely by reading the statutory provision to the jury, although it is by no means certain whether its phrasing will make them any the wiser. Lord Goddard expressly stated that the English judge had no duty to explain more fully to the jury what exactly Parliament had intended.

W. A. E.

MEMORIAL FUND—Imperfect trust provision—Resulting trust to subscribers.

The case of *Re Gillingham Bus Disaster Fund* [1957] 3 W.L.R. 1069 arose out of the tragic accident in 1951 when a bus ran after dark into a column of young marine cadets marching along a road in Gillingham, Kent, killing twenty-four of them and injuring a further number. The mayors of surrounding towns wrote a letter to a daily newspaper which was published in the following terms: "... The Mayors ... have decided to promote a Royal Marine Cadet Corps Memorial Fund to be devoted, among other things, to defraying the funeral expenses, caring for the boys who may be disabled, and then to such worthy cause or causes in memory of the boys who lost their lives, as the Mayors may determine." A large sum of money was thereupon contributed by the public partly in sums from known persons but mainly anonymously as a result of street collections, football matches, whist drives and so forth. As the bus company admitted liability for the accident full compensation was paid to the injured boys and relatives and only a portion of the funds contributed was expended on the initial purposes of the Disaster Fund. The question accordingly arose as to what should be done with the balance, which question the trustees proceeded to raise by summons before the court. The court had no difficulty in holding in the first place, that as the funds were not to be applied exclusively for charitable objects, there could be no *cy-près* application. The Treasury solicitor then proceeded to claim that the surplus should be paid to the Crown as *bona vacantia*, there being no resultant trust in favour of the subscribers. Harman J. held that the general principle was that where money was held on trust, and the trusts declared did not exhaust the fund, the balance would revert to the donors on a resultant trust; as the Crown in the present case had failed to show that all or any of the donors had parted with their money out and out, the surplus of the fund would have to be held on resulting trust in accordance with the general principle, and there would have to be an inquiry to establish the subscribers' identity. If anonymous contributors could not be found and the resulting trust in their favour could not be executed this would not change their contributions into *bona vacantia*, but the trustees would require to pay their money into court like any other trustees who cannot find their beneficiary.

The law accordingly appears to be that if the money is subscribed for charitable purposes which subsequently fail the funds will be applied under a *cy-près* scheme. If there was no charity and the subscribers can be shown to have made out-and-out gifts, the funds will go to the Crown as *bona vacantia*. If no out-and-out gift is proved, then there must be a resulting trust in favour of the original subscribers whose contributions, if their donors cannot be identified, must be paid into court. In England *bona vacantia* in such cases are in practice usually allowed by the Crown to be applied under a *cy-près* scheme prepared by the charity commissioners.

W. A. E.

3. PRIVY COUNCIL CASES

JUDGMENT A NULLITY: Power to review.

Kofi Forfie, Odikro of Marban v. *Barima Kwabena Seifah, Kenyasehene* ([1958] 2 W.L.R. 52) was an appeal from a judgment of the West African Court of Appeal, given in June, 1951, which set aside as nullities two judgments given by Mr. A. C. Spooner in the Chief Commissioner's Court on May 10 and June 29, 1949, respectively. The appeal related to the power to review a judgment. By Order 41 in the Third Schedule to the Courts Ordinance (Laws of the Gold Coast, 1936): "(1) Any judge, magistrate, or other judicial officer, may, upon such grounds as he shall consider sufficient, review any judgment or decision given by him (except where either party shall have obtained leave to appeal . . .), and upon such review it shall be lawful for him to open and re-hear the case wholly or in part, and to take fresh evidence, and to reverse, vary or confirm his previous judgment or decision, or to order a non-suit. (2) Any application for review of judgment must be made not later than fourteen days after such judgment. . . ."

The respondent instituted an action against the appellant in

October, 1936, in Divisional Native Court B of Kumasi to recover a tract of land. That court found in favour of the appellant and dismissed the respondent's claim. On appeal to the Asantehene's Court A2 the judgment was reversed and the respondent succeeded. The appellant thereupon lodged an appeal to the Chief Commissioner's court. Mr. A. C. Spooner, the president of the court at that time, delivered judgment in favour of the appellant on May 10, 1949. That judgment was appealed to the West African Court of Appeal, and two dates relating to that appeal were relevant. On May 27, 1949, the respondent obtained conditional leave to appeal, and on July 15, 1949, final leave was granted. But on May 10, 1949, Mr. Spooner had no power to exercise judicial functions as, on that day, his appointment to preside over the Chief Commissioner's Court stood rescinded. Appointments to preside over that court could be and were made by orders signed by the Colonial Secretary and published in the *Gazette*. When Mr. Spooner heard the case he held office under Order No. 84 of 1948. By Order No. 32 of 1949, signed on May 10, 1949, a Mr. Allen was appointed to preside over the court and Order No. 84 of 1948 was rescinded. By a further Order, No. 42 of 1949, made on June 21, 1949, Mr. Spooner was appointed commissioner for the period June 23, 1949, to June 30, 1949. On June 29, 1949, acting under the power to review a judgment conferred by Order 41, rule 1, he reviewed his judgment of May 10, 1949. He said that he had no jurisdiction on May 10 to deliver that judgment and, stating that he was acting under his power to review, he delivered a judgment identical in terms with his original judgment.

The Board stated that the power given by Order 41 to review a judgment was extremely wide, and its object was to enable a court, which was of opinion that a judgment or decision which it had given was erroneous, to corect the error. If, as the respondent argued, the term " judgment " must be limited to judgments made with jurisdiction, it followed that the Order enabled a court to correct all errors which it made except the error that it had given a judgment which it had no jurisdiction to give. Such a result would be curious, and the Board could not accept the argument. To say that a judgment was a nullity was not to say that it was not a judgment for any purpose, and, in particular, that it was not a judgment within the meaning of the term in

Order 41. That term meant nothing more than an adjudication by a judge on the rights of the parties. If made without jurisdiction it would be ineffectual, but its effectiveness or otherwise was not relevant to the question whether it was a judgment. Consequently a judge might under the Order review a judgment which he had delivered at a time when he had no jurisdiction and, on such review, give a second judgment. If at the time of the second judgment he had jurisdiction, that second judgment was not a nullity. That was the position in the present case. The Board stated that they could not accept the argument that a judge could not act under rule 1 unless a party applied under rule 2. That rule placed parties under a limitation as to time without imposing a similar limitation on a judge. With regard to the argument that the words " except where either party shall have obtained leave to appeal " in rule 1 were applicable, because the respondent had at the time of the review obtained conditional leave to appeal and fulfilled the conditions, although the court had not granted final leave, the Board thought that the words quoted related to the point of time at which final leave was formally granted by the court. They could not, therefore, accept the argument.

It was further contended that Order No. 42 of 1949, which appointed Mr. Spooner for the period June 23, 1949, to June 30, 1949, was ineffective because Mr. Allen's appointment had not been rescinded. The Board were of opinion that more than one person could be appointed to function at the same time. By section 63 of the Courts Ordinance: " The Governor may . . . appoint a fit and proper person to preside over the Chief Commissioner's Court. It was conceded that the singular included the plural. Consequently, " a fit and proper person " included " fit and proper persons," and the word " preside " did not stand in the way of that interpretation. Two persons could be appointed, but as they would not both sit in the same court at the same time no difficulty could arise. Moreover, if only one person could be appointed the later appointment of Mr. Spooner would prevail over the earlier appointment of Mr. Allen. Further, a court had inherent power to set aside a judgment which it had delivered without jurisdiction. (*Dictum* of Lord Greene, M.R., to this effect in *Craig* v. *Kanseen* ([1943] K.B. 256, at p. 262) approved.) Assuming the judge had no power on June 29, 1949, to review his judgment of May 10, 1949, he nevertheless had power to declare it a nullity and proceed to give a fresh judgment—which he in fact did.

In the West African Court of Appeal it was stated that the appeal against the reviewed judgment of June 29, 1949, had not yet come before that court, but that that reviewed judgment must also be declared a nullity, and an order was so made. That view and that Order stood in the way of the appeal from the judgment of June 29, 1949, being proceeded with. The Board therefore stated that the appeal would be allowed and the case sent back to the Court of Appeal of Ghana to deal with such other points as arose on the appeal from the judgment of June 29, 1949, on the basis that that judgment was not a nullity, although the judgment of May 10, 1949, was a nullity.

Conflict of traditional history.

Twimahene Adjeibi Kojo II v. *Opanin Kwadwo Bonsie and Another* ([1957] 1 W.L.R. 1223) was an appeal from a judgment of the West African Court of Appeal, affirming a judgment of the Supreme Court of the Gold Goast (Land Court), Ashanti, which had reversed a majority judgment of the Asantehene's A Court, reversing a judgment of the Asantehene's B Court, which had dismissed the present appellant's claim for a declaration of title to certain land at Bonkwaso in the Kumasi district of Ashanti. The Board, in their judgment, stated that they had noticed that the judges in the appeal courts, who were in favour of upholding the decision of the Asantehene's B Court, did so on two grounds: first, that it was a decision of fact depending on the demeanour of the witnesses and almost inviolable on that account; secondly, that on a review of the evidence it was a correct decision.

With regard to the first ground the Board did not think that it was the correct approach to the case. There was no dispute as to the primary facts, that was, the facts which the witnesses actually observed with their own eyes or knew of their own knowledge in their own lifetime. The dispute was all as to the traditional history which had been handed down by word of mouth from their forefathers. In that regard it must be recognised that, in the course of transmission from generation to generation, mistakes might occur without any dishonest motives whatever. Where there was a conflict of traditional history, one side or the other must be mistaken, yet both might be honest in their belief. In such a case demeanour was little guide to the truth. The best way was to test the traditional history by reference to the facts in recent years as established by evidence and by seeing which of two competing histories was the more probable. That was how both the native courts approached the matter, and the Board thought that they were right in so doing. If both the native courts had come to the same conclusion the Supreme Court would naturally have been slow to disturb it. But when, as in the present case, the native courts differed, the Supreme Court was necessarily called on to review the evidence and draw its own inferences. It should not start with the presumption that the lower native court (here the B court) was correct because it saw and heard the witnesses, but should rather give weight to the views of the native court of appeal (here the A court). In the end, however, it must reach its own conclusion, just as a court of appeal in England must, on inferences of fact: see *Benmax* v. *Austin Motor Co., Ltd.* ([1955] A.C. 370).

So far as the second ground was concerned, the Board had themselves reviewed the evidence, and two facts stood out as established. The Board, having referred to those facts, said that they turned the scale in favour of the defendants. Their Lordships appreciated the force of the arguments of the majority of the Asantehene's A Court, but on balance they thought that the decision of the Asantehene's B Court was correct. In so doing, they found themselves, on that second ground, in agreement with the President of the A Court and the judges of the Supreme Court and the West African Court of Appeal. The appeal was accordingly dismissed.

RIVAL CLAIMS TO LAND: Estoppel by conduct.

Nana Ofori Atta II, Omanhene of Akyem Abuakwa, and Another v. *Nana Abu Bonsra II, as Adansehene and as representing the Stool of Adanse, and Another* ([1957] 3 W.L.R. 830) was an appeal from a judgment of the West African Court of Appeal (Gold Coast Session), affirming a judgment of the Supreme Court of the Gold Coast which dismissed the appellants' claim for a declaration of title to land and an injunction. The case arose out of a dispute about the title to certain lands in Ghana called the Nsuakwate or Anungya lands. The plaintiff, the Stool of Akyem Abuakwa, was represented by the head chief, Nana Ofori Atta II (hereinafter called " Akim Abuakwa ") ; the defendant, the Stool of Adanse, was represented by the head chief, Nana Abu Bonsra II (hereinafter called " Adansi "). Akim Abuakwa, a paramount stool, said that the lands in dispute were under its paramountcy, and in particular that they were part of the Muronam lands which were subject to it. The Odikro, or sub-chief of Muronam, was joined as a co-plaintiff. Adansi, a neighbouring stool, claimed that the lands in dispute formed part of the Adansi stool but were under the immediate custody of the Stool of Banka, and that Banka was caretaker of the lands for Adansi. Though joined as a co-defendant in the courts of West Africa, Banka was not represented before the Board.

The question on the appeal was whether it was open to Akim Abuakwa to litigate in this action the title to the lands in dispute. Adansi said that the title to the lands in dispute was fought out sixteen years ago in proceedings between Muronam and Banka, when Muronam failed to establish its title. The question was whether that finding precluded the paramount stool of Akim Abuakwa from now claiming title against Adansi, which said that Akim Abuakwa was so precluded on one or other of two grounds: (1) estoppel by *res judicata* on the ground that Muronam was a party to the previous proceedings and Akim Abuakwa was a privy to them; or, alternatively, (2) estoppel by conduct on the ground that Akim Abuakwa knowingly stood by while the title was fought out by its subordinate in the previous proceedings and it would be inequitable to allow it to bring up the question again. The claim of Akim Abuakwa and Muronam was dismissed by the courts below.

The Board stated that everything depended on what took place in the previous proceedings. In the result Muronam failed on the ground that it had not made out its title to the disputed lands. Akim Abuakwa and Adansi were not parties to those proceedings, but they undoubtedly knew of them and of the disputes which had been going on for years before. Under the rules of court Akim Abuakwa or Adansi could have applied to be joined as parties in those earlier proceedings, but neither of them did so. There was as between Muronam and Banka a clear estoppel by *res judicata* because they were parties, but was there an estoppel between Akim Abuakwa and Adansi, who were not parties? The general rule of law that no person was to be adversely affected by a judgment to which he was not a party admitted of two exceptions: (1) a person who was in privity with the parties was bound equally with the parties, in which case he was stopped by *res judicata*; (2) a person might have so acted as to preclude himself from challenging the judgment, in which case he was estopped by his conduct. To determine the latter question the West African Court of Appeal quoted from a principle laid down by Lord Penzance in *Wytcherley* v. *Andrews* ((1871) 2 P. & D. 327, at p. 328): "There is a practice in this court, by which any person having an interest may make himself a party to the suit by intervening: and . . . if a person, knowing what was passing, was content to stand by and see his battle fought by somebody else in the same interest, he should be bound by the result, and not be allowed to re-open the case. That principle was founded on justice and common sense, and is acted on in courts of equity, where, if the persons are too numerous to be all made parties to the suit, one or two of the classes are allowed to represent them." Assuming, without deciding, that the English decisions had hitherto been confined to wills and representative actions, there was nothing in the principle itself, the Board stated, which compelled it to be so limited. It was, as Lord Penzance said, founded on justice and common sense. It might have been found appropriate in England only in special conditions. But there was no reason why in West Africa it should not be applied to conditions which were found appropriate for it there, but which had no parallel in England. The judges below had applied the principle and given reasons which showed that it was salutary. The Board said that unless technical reasons existed which prevented the application of the principle, it should be applied. They were unable to find any such reasons, and were therefore of opinion that the principle was correctly applied. That conclusion rendered it unnecessary to decide whether Akim Abuakwa was a "privy" to Muronam so as to be estopped on that ground also. The appeal was accordingly dismissed.

4. REPORTS

Committee on Building Legislation in Scotland

The terms of reference of this committee under the chairmanship of C. W. Graham Guest, Esq., Q.C. (as he then was), were " to examine the existing law for the general regulation of building in Scotland so far as it relates to the control of building standards by the Secretary of State and by local authorities; to consider the extent of the jurisdiction exercised by the Dean of Guild courts as regards building standards; and to recommend what changes may be necessary to secure a control of building standards which would operate as uniformly as possible in counties and burghs, and be flexible enough to take account of the development of new techniques and materials." It would be difficult in the law of Scotland to find a more abstruse subject and all the more praise is due to the committee for producing a report which is a model of clarity and good advice.

It was originally the Dean of Guild courts who for burghs laid down their different local building standards. With the advent of the Burgh Police Acts in the nineteenth century, building control, from the public health and safety aspect, became mainly a matter for Parliament. The Burgh Police (Scotland) Act, 1892, contained a set of model building rules and the Public Health (Scotland) Act, 1897, empowered county councils to make by-laws relating to building standards in the landward areas. The Burgh Police (Scotland) Act, 1903, also enabled other local authorities to do so. Model by-laws were issued by the Department of Health in 1932 which were revised in 1932, 1937 and 1954. But these model by-laws still fell short of a comprehensive building code. Moreover, throughout the whole period of development, the larger local authorities were promoting their own private legislation. Included in these local Acts were building provisions which adapted or improved upon the provisions in the general statutes. The result is that the provisions which affect building standards in Scotland are now scattered throughout a multitude of by-laws, rules and statutes, both local and general.

The committee report that from their examination of the existing law they are satisfied, first, that it is confusing for all the parties concerned with the erection of buildings to have so many different Acts, regulations and by-laws affecting building standards and to have to comply with different requirements in different districts; secondly, they consider that it is restrictive in that the machinery of control lacks adequate provision for relaxing requirements where justified in individual cases. This is chiefly because authorities framing legislation have to work within by-law-making powers which are limited either as regards building functions or the types of building to which they can apply; and, thirdly, because many provisions are archaic in that they are drawn up in terms which reflect only the ways thought sufficient half a century ago.

The committee's principal recommendation is that the scattered provisions which at present comprise the machinery of building control should be replaced by a new Building Act. To help our legislators the main provisions of such an Act are outlined in an Appendix. It is interesting to note that in their detailed consideration of the problem the committee regard the scope of building control as the protection of the public interest as regards health and safety. The siting of buildings, their amenity and the particular use to which they are intended to be put, are all now regarded as questions of planning control.

The committee's recommendations in regard to the Dean of Guild courts is that they should continue to exercise jurisdiction as regards building control in burghs but should deal with applications to build by reference only to the new statutory building code. There was a considerable body of evidence before the committee showing a preference for Dean of Guild procedure, with service of petitions on co-proprietors, etc., and the conduct of procedure as a court of law. This procedure tended to promote " good-neighbourliness " in contradistinction to the informal procedure adopted by county court committees responsible for exercising Dean of Guild functions in the landward areas. The committee accordingly recommend bringing county council procedure and the composition of their committees more into line with the Dean of Guild courts.

One can only hope that this admirable report is translated into law as soon as possible and does not suffer the fate of so much " unimportant " Scottish legislation at the hands of an overloaded legislature and Scottish Grand Committee.

W. A. Elliott.

The Fourth Report of the Law Reform Committee for Scotland

The Fourth Report of the Law Reform Committee for Scotland has now been presented to Parliament (Cmnd. 330, 1957). The committee had been invited by the Lord Advocate to consider the effect on the liability of insurance companies of special conditions and exceptions in insurance policies and of non-disclosure of facts by persons effecting such policies. The committee had the advantage of exchanging information with the English Law Reform Committee, of seeing the memoranda submitted to that committee by various bodies, and of reading their report, presented to Parliament in January, 1957 (Cmnd. 62). The Scottish Committee approached their task by considering those principles of Scots law in the sphere of insurance which might encourage insurance companies in the sort of unfair practice which has received judicial condemnation in the past, *e.g.*, the use of technicalities or trivialities or what the layman calls " the small print at the foot of the page " to escape liability. It may be said at once that the committee were shown no evidence that any general hardship occurred, and for various reasons to be considered shortly, do not recommend any alterations in the law.

The committee's report contains a most useful survey of certain principles common to all types of insurance, and the problems that can arise therefrom. The first question considered was the conventional materiality of statements in an insurance policy. The general rule in contract is that the breach of a term only makes the contract voidable where that term is material. It is for that reason that insurers insert in their policies a clause declaring that the statements in the proposal form are the basis of the contract and are expressly declared to be " material." The insurer can then repudiate the policy if any of the statements made in the proposal form are proved to be incorrect, even though they have no *de facto* materiality in the calculation of the risk. The law on this matter has been made too plain for argument since the decision in *Dawson's, Ltd.* v. *Bonnin*, 1922 S.C.(H.L.) 156, where an insurance company escaped liability under a contract of insurance of a motor-lorry against third-party risks, because of a mis-statement in the proposal form (which had been declared to be " the basis of the contract ") as to the place where the lorry would normally be garaged. There is one notable qualification of this rule in the Road Traffic Act, 1934, s. 10, which prevents an insurance company from repudiating a third-party claim in motor insurance, even if they are entitled to repudiate the contract against the assured on the ground of a mis-statement, except where the mis-statement was *in fact* material. The committee do not recommend any legislation on this point, since they had seen no evidence to show that companies have in recent years acted unreasonably or unfairly, and it was felt that the great majority of insurers would never use this rule of law to escape liability where the claim was in substance well founded.

Since contracts of insurance are *uberrimae fidei*, both parties are obliged to disclose all the material facts. The report deals in some detail with the effect of the insured's failure to disclose material facts—as opposed to actual mis-statements, which are dealt with under the earlier heading. There is no doubt as to the general obligation to disclose all material facts, but the distinction then arises—what is the test by which the *materiality* of the non-disclosed fact falls to be tried? Is the test that of the reasonable man as insured, or is it that of the reasonable insurance company as insurers? In the case of *Hutchinson & Co.* v. *Aberdeen Sea Insurance Co.* (1876) 3 R. 682, two judges took the view that the proper test was based on what a reasonably prudent underwriter would have done, but the case is not clear authority since there was an element of fraud involved. In *The Spathari*, 1925 S.C.(H.L.) 6, there are opinions, albeit *obiter*, of judges both in the Court of Session and the House of Lords, that it would be relevant to consider whether the person failing to disclose could have realised that the fact concealed would, if disclosed, have influenced the judgment of a prudent insurer. Similarly, in the case of *Life Association of Scotland* v. *Foster* (1873) 11 M. 351, Lord President Inglis at p. 359 suggests that it is the duty of the person being insured to state every circumstance *which any reasonable man might suppose* could influence the insurer in deciding whether to enter the contract. The committee leave us in no doubt, however, of their view that the test of the reasonable insurers is the correct one to determine the materiality of any non-disclosure. Theoretically, this test is open to criticism, since it seems wrong in principle that the validity of the contract should depend on whether the insured person has revealed certain information to the company, of the materiality of which they are to be the sole judges. The materiality of any fact is thus to be determined not by common sense (the test of what the reasonable man thinks), but by the specialised knowledge of the insurance company. The report acknowledges this difficulty, and the committee outline their reasons for selecting the reasonable insurance company as the proper test. It is pointed out that this test has been already twice adopted by the legislature (Marine Insurance Act, 1906, s. 18 (2), and Road Traffic Act, 1934, s. 10 (5)). Again, some classes of insurance fall partly within and partly outside the scope of the Marine Insurance Act, and it would be manifestly absurd to have two different tests of materiality affecting the one contract.

The report also deals with the distinction between contracts which are single contracts (*e.g.*, life assurance), and contracts which are renewed annually (*e.g.*, motor-car and household insurance), where each renewal constitutes a separate contract. The original contract usually forms the basis of the renewed contract, but a failure to advise the insurers of a change in circumstances over the year may render the contract unenforceable by the insured. In many cases, companies do not remind the insured persons of the necessity for an annual re-check. The committee do not recommend legislation on this topic in the absence of any evidence of hardship.

The practice of insurance companies describing as " agents " the vast army of solicitors, accountants, motor-car salesmen, house factors and others who nowadays are prepared to provide insurance proposal forms also comes in for some criticism. The companies are happy to describe these people as " agents " when concluding insurance contracts, but are not prepared to acknowledge them as agents in law. Thus, liability in respect of any knowledge or notice to an " agent " not communicated to the insurers is usually rejected by the terms of the contract. Once again, the committee feels that any alteration in law might mean a dislocation in business, and although the law is manifestly uncertain, no changes are recommended.

The important matter of arbitration clauses is the last one dealt with in the report. Some companies insist on arbitration, and it is quite legal to exclude recourse to the courts under a contract. The effect of this has been to conceal from public scrutiny the conduct of insurance companies with regard to disputed claims. It has also stunted the extension and development of the legal principles of insurance through the normal means of judicial decisions. On the other hand, the insurer does benefit by arbitration in that such procedure is generally less expensive than an action in court. It should be noted that the British Insurance Association and Lloyd's, representing the great majority of British companies, advised the committee by letter that they have agreed to refrain from insisting on the enforcement of an arbitration clause should the insured person prefer to have the question of liability determined in a court of law. One of the major grounds of complaint has thus been voluntarily removed.

Considering the report as a whole, the committee have obviously been impressed by the representations of the British Insurance Association and Lloyd's, in particular to the effect that the law has worked well for many years with little friction. The conduct of insurance business with foreign clients overseas has for long been one of our greatest " invisible " exports. It is suggested that any new legislation might be construed as inferring a lack of integrity or fair dealing on the part of British insurers, and might result in a severe loss of prestige and a falling off in our vast foreign insurance business. The committee do not feel qualified to judge whether such a fear is well founded, but clearly if it is, it is a very good reason for not introducing legislation.

The report focuses the problems of insurance in a most illuminating way, and its conclusions have been reached by the committee after a searching and painstaking study of the law. The committee make no recommendations to alter the law, although they do make suggestions for improvement should any be thought necessary; they do not press these suggestions as recommendations because their investigations " have revealed no complaints with regard to the existing law." This is the only matter which raises some disquiet. Have the committee gone far enough in their inquiry—not into the law, which they have done admirably, but into actual complaints of hardship? Any criticism is directed not, of course, against the committee, but against the limited means open to them of investigating cases of hardship. True, the usual public advertisements were made, but only one representation was received. Some personal investigations were made by members themselves, but the evidence put before them was largely supplied by the insurance companies. On the other hand, there is no body or institution which represents aggrieved insured persons—unless it be the Automobile Clubs and Associations which gave evidence. There are probably few private individuals who would now care to give evidence about claims unfairly rejected perhaps many years ago. Furthermore, the use of arbitration means that harsh treatment by insurance companies seldom reaches the glare of the courts and the newspapers. Parliament may feel that a more thorough-going inquiry into cases of alleged hard treatment is called for before finally determining to leave the committee's useful suggestions in the cold storage of the parliamentary files.

N. G.

The Franks' Committee

In 1932 the Committee on Ministers' Powers [1] presented its report, covering both administrative legislation and adjudication. The establishment of the Scrutiny Committee, in 1944, and the enactment of the Statutory Instruments Act, in 1946, carried out many of the recommendations on the first head. Administrative adjudication was on the whole left alone,[2] and it was only the affair of Crichel Down which renewed official interest in this topic. There is a pleasant illogicality in that, since procedures and faults such as those involved in Crichel Down proved to be outside the terms of reference of the new, Franks', Committee on Administrative Tribunals.[3]

There is immediately apparent a contrast between the reports of 1957 and of 1932. The Ministers' Powers Report, in this part at least, remained on a level of high theory, and the theory which it expounded was open to easy attack, particularly on matters of terminology. In contrast, the Franks' Committee comes down to earth. After a general discussion of principles, the bulk of the report is concerned with particular tribunals and procedures. The report may not thereby escape attack, but at least its recommendations can be more readily put into practice. This practical character of the report is well indicated by the paragraph which, after emphasising the influence of two pairs of antitheses—that which is judicial and that which is administrative; what accords with the rule of law and what is arbitrary—states: " Nothing that we say diminishes the importance of these pairs of antitheses. But it must be confessed that neither pair yields a valid principle on which one can decide whether the duty of making a certain decision should be laid upon a tribunal or upon a Minister . . . but, even if there is no such principle and we cannot explain the facts we can at least start with them. An empirical approach may be the most useful." There are obvious practical advantages in a report thus governed, but, obviously, it is also more difficult to summarise its conclusions and what follows is concerned only with the principal recommendations.

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[1] Cmd. 4060.

[2] The Administration of Justice (Miscellaneous Provisions) Acts, 1933 and 1938, introduced some procedural reforms in England.

[3] The Committee on Administrative Tribunals and Enquiries, commonly called the Franks' Committee. Its report was published as Cmnd. 218. Subsequent references to *Hansard* are to the debates on the report 575 H.C. Deb. 400–516 and 206 H.L. Deb. 522–591.

Perhaps the most important recommendation is that there should be established two councils on tribunals, one for England and Wales (appointed by the Lord Chancellor) and one for Scotland (appointed by the Secretary of State).[4] These councils are to have three main functions. The first is to appoint members of tribunals, the chairmen of tribunals being (with some exceptions) appointed by the Lord Chancellor (or the Lord President), who would also have the responsibility of removing where necessary either chairman or members.[5] The object here is simply to emphasise the neutrality of tribunals. The councils are, however, to be more than mere electoral colleges. They are also to formulate detailed procedural rules for tribunals and inquiries, to advise upon the establishment of any new tribunals, to watch the conditions of service and remuneration of members of tribunals, and perhaps most importantly to keep the systems of tribunals under continuous review. For the last purpose they are to have power of taking evidence, and to increase their standing and power all their functions are to be statutory. In short, they are to put and keep tribunals on the right lines.

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[4] The Government proposal is for the establishment of one council with a Scottish panel (575 H.C. Deb. 404). This variation may not be of great importance, provided that the Scottish panel is strong enough to emphasise the differences in law which exist, but which are not always given full weight, see p. 81, *post*. The establishment of the council is accepted by the Government as the first step.

[5] Again the Government proposes a variation—members of tribunals should be appointed by Ministers after consultation with the council (575 H.C. Deb. 406, 515). The object is to preserve accountability to Parliament. Here, however, other factors may be more important than this constitutional doctrine, and if real weight is to be given to the advice of the council, it might be better to adhere to the committee's proposal.

Thereafter, the report distinguishes tribunals established by statute for ministerial purposes, and inquiries where the inquiry is simply a preliminary to a ministerial decision.

The recommendations on tribunals themselves are governed by desire that their operation should be marked by openness, fairness and impartiality. Greater certainty is to be attained by ensuring that all parties should receive a " note " which, while avoiding the formality of pleading, would nevertheless indicate the case to be met. Hearings should normally be public, exceptions being made where, as with National Assistance Tribunals, details of personal affairs must be disclosed. As a consequence of this emphasis on public hearing it is suggested that the question of granting absolute privilege to witnesses be considered, particularly when evidence is on oath. While it is proposed that all tribunals should have the power of administering the oath, it is expected that normally many would not use this power. Similarly, it is proposed that all should have the power to compel the attendance of witnesses and the production of documents. There are also recommendations to ease the lot of " consumers," such as the allowance of expenses to both successful and unsuccessful applicants before social service tribunals, or the extension of the legal aid scheme to cover major tribunals.[6]

In all this the committee does not produce working drawings; it is content to give a sketch plan and leave it to the two councils to provide the former. On appeals and judicial review the report is more precise. Review on points of law by the ordinary courts should be universal and should take the form of an appeal,[7] as distinct from an application to quash, though for the latter purpose the committee recommends the continuation of the English prerogative orders. In this field it is worth noticing that the committee rejects the idea of either a general administrative appeal tribunal or an administrative division of the courts—thus in Scotland appeal would lie to the Inner House. Apart from these general matters the committee surveyed the working of over twenty of the more important tribunals (or sets of tribunals). Many were approved as they stand, in other cases changes were suggested, ranging from a possible increase in legal representation before the National Insurance Tribunals[8] to substantial alterations in the appellate procedures from Rent, and National Health Service, Tribunals.

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[6] The proposal on legal aid is rejected meanwhile (575 H.C. Deb. 410, 516) on financial grounds; the other proposals have not yet been debated, and on them the views of the council are to be sought. There are to be reforms in the allowance of out of pocket expenses (206 H.L. Deb. 581).

[7] Judgment was here reserved (575 H.C. Deb. 407), but the Committee's proposals are now apparently accepted, 206 H.L. Deb. 582.

More important alterations are suggested for inquiries. Here again the essence of the proposals is the introduction of more formality and greater openness. Before the hearing housing, planning, and acquiring authorities should give particulars of their case,[9] and also should normally give the views of Government Departments which have been consulted. This preliminary statement should be accompanied by a statement of relevant general ministerial policy so that parties to the inquiry would be aware of the essential arguments about a particular case and of the general background. Inspectors holding inquiries (in England) should, while having close contacts with Departments, be controlled by the Lord Chancellor in order to increase public confidence in their impartiality.[10] At the inquiry there should be a full statement, supported by evidence (where appropriate) of the case of the initiating public authority. Once again the councils are to formulate detailed procedural rules within a proposed framework. The " framework " includes the recommendation that where a Ministry itself starts a compulsory purchase order or the like, it should give evidence, and where the views of a Department other than the deciding one are referred to in the preliminary statement, or in other evidence, then that other Department should also give evidence limited to matters of fact and not of policy.[11]

The proposals are even more far reaching in the post-inquiry stage. The inspector's report should be made public, should summarise evidence and deductions therefrom, and should recommend courses of ministerial action.[12] After publication there should be an opportunity for the parties to propose corrections of what they conceive to be errors of fact in the report. Further, after the report has been thus settled, there should be an obligation on the Minister to make known to the parties any additional factual evidence which he receives (the parties then having an opportunity to make observations on that evidence). Thereafter the Minister should deliver a reasoned decision.[13] In these cases no appeal to the courts is contemplated beyond appeals based on a failure to observe procedural requirements, or on a challenge on grounds of competency. Again there are also particular recommendations such as that in compulsory acquisition cases objectors should give notice of alternative sites which they wish to discuss at the inquiry, or in planning matters, that owners of land should receive notice of development applications by third parties.

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[8] Accepted (575 H.C. Deb. 407, 515) without the fetter of the requirement of the consent of the chairman suggested by the committee, and see 206 H.L. Deb. 581, where there is a minor reservation.

[9] This is apparently accepted with immediate effect (575 H.C. Deb. 409). The proposal for a policy statement is rejected in favour of the publication of selected decisions from which a policy might be deduced (206 H.L. Deb. 585).

[10] Here again the Government proposes a compromise. Appointment of inspectors after consultation with the Lord Chancellor, dismissed only with his consent (575 H.C. Deb. 410). No change is proposed by the committee or by the Government in the Scottish practice of appointing Commissioners from the general body of the Bar.

[11] Accepted with some modifications (575 H.C. Deb. 414).

The general framework is then clear. The individual is to be protected by ensuring that he has as full notice of the issues involved as is consistent with the avoidance of undue formality, by the extension of powers of review, and by making tribunals and inquiries as neutral as may be. Yet these suggested improvements are not provoked exclusively by concern for individuals. A concern for sound administration is also at work. Efficiency in government involves not merely the attainment of ends but also their attainment in a manner which satisfies, or at least does not unduly disturb, the community for which the government exists. Thus, on occasion, more cumbersome machinery may in this sense be more efficient than more streamlined machinery. So here many of the proposals are advanced in the hope that they will maintain public confidence and thus render decisions more readily acceptable. This concern is more noticeable in regard to inquiries, but it also operates in regard to tribunals. The adoption of this general approach emphasised a conflict of opinion. Official evidence tended to treat tribunals, and, *a fortiori*, inquiries as an extension of the administrative process.

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[12] Accepted as to the inspector's findings, the Minister's decision and the reasons therefor (575 H.C. Deb. 411). Normally the report will, it seems, contain no recommendations, but if it does these too will be published (206 H.L. Deb. 588).

[13] This is accepted (575 H.C. Deb. 412); the other proposals are, it seems, to be considered further.

This view the committee rejected, holding tribunals to be machinery provided by Parliament for adjudication, and this attitude again influenced views on inquiries.

Perhaps the first general criticism of the report is that on this matter the committee has been too much influenced by a supposed absolute principle or distinction. In reality the too rigid adherence to one or other view is unlikely to produce a satisfactory result. The first view can lead to the sort of conclusions indicated in the evidence of the Ministry of Housing and Local Government which are in practice undesirable.[14] The second view may also hinder the attainment of governmental efficiency (within the committee's definition) by over-emphasising the need or the desire to ensure the acceptability of decisions. Clearly with the sort of decision involved in the inquiry group some particular dissatisfaction is inevitable, and provisions intended to abate the individual's feeling of "Why pick on me?" can be carried too far. Even with pure tribunals there is often substantial truth in the "official" view. Whether a question is decided by a simple administrative process or by a tribunal often depends not upon the nature of the decision, but upon other factors, the number of cases, the amount involved, or mere chances of history. Decisions such as those of the National Insurance Commissioners on the inter-relation of schemes for guaranteed weeks and claims for unemployment benefit must involve large elements of policy, and often bear a resemblance to questions put to the Advisory Committee on National Insurance.[15] This mixed function is further emphasised by the reservation of certain questions to the Minister himself under, *e.g.*, the National Insurance Act, 1946, s. 43.

In assessing the recommendations the question to be asked is the difficult one—whether a right balance has been struck between two conflicting points of view which give different weight to the importance of interest or impartiality and of detachment or integration. It may be that the committee having at one stage rejected the process of classification as being unhelpful, has, at a later stage, been too strictly governed by the conceptions upon which that classification depends. This question of balance is important, since it affects not merely the problem of the composition of tribunals but also that of their relationship to the ordinary courts. Too close a supervision by the latter may indirectly increase the element of strict law and decrease that of policy or flexibility to an undesirable extent. It must not be forgotten that in the field of industrial injuries the whole machinery was altered in the recent past largely because of this difficulty.[16] It is, indeed, in relation to judicial review that the recommendations are most open to criticism. The machinery proposed by the committee for the appointment of members of tribunals, though it may not differ greatly in substance from present practice, has advantages. Other reforms, such as those of the tribunals under the National Health Service Acts, should also allay uneasy feelings. The proposals for the formulation of procedural rules cannot be judged at this stage. Much, obviously, depends upon their content, but, provided that the rules do not vary too greatly between tribunals, and adhere closely to the ideas of the report, they, too, could be helpful.

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[14] *Minutes of Evidence*, Third and Fourth Days Q. 614 *et seq.*

[15] Compare the decisions of the Commissioner R(U) 21/56 and R(U) 22/56 with the preliminary draft of the National Insurance (Contributions) Amendment Regulations, 1957, submitted to the Advisory Committee, or the report of the committee on the earnings limits, etc., Cmd. 9752.

More doubt may be felt on judicial review. Two initial points may here be made. The report states " The courts in Scotland do not however exercise this jurisdiction to quash a decision for an error on the face of the record " (§ 107), and " It may be however that no difficulties will arise [because of the absence of certiorari in Scotland] in that certainly the Commissioners and probably National Assistance Appeals Tribunals, wherever they sit, are subject to the supervision of the English courts " (§ 110). It appears difficult to reconcile this second proposition with the well-known provision " that no causes in Scotland be cognoscible by the Courts of Chancery, Queen's-Bench, Common-Pleas or any other Court in Westminster-Hall." It is equally difficult to reconcile the first assertion with the general principles formulated by Lord Cockburn in *Pryde* v. *Heritors and Kirk Session of Ceres* [17] and reiterated in many modern cases of a like type. Indeed, it is difficult to avoid the conclusion that here the committee has been led into a " Black Swan " fallacy based upon the absence of certiorari in Scotland, an absence which, far from being a disadvantage, may, as has been suggested elsewhere,[18] be a positive gain. Certainly it is to be hoped that there will be no extension of the prerogative orders into Scotland. Apart from these particular matters, the proposed appeal on a point of law may well prove to be too wide and also to be too fruitful a source of litigation. The segregation of law and fact in a report is easy, in practice the two are not easily distinguishable, and ingenuity can dress up too many complaints against a factual decision as matters of law.[19] It may be that the limitation to appeals " by leave " could surmount the difficulty, but on the whole, particularly in Scotland, it seems preferable that matters should be taken in stages. The proposed reforms in tribunal procedure, and the strengthening of tribunals themselves may well prove adequate within the present framework of judicial review. If they do not, then the question of further appeals might be looked at again. Certainly, if the councils are instituted, that seems the best course.

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[16] See, *e.g.*, the discussion in (1957) 2 *Public Law* 89 of *R.* v. *Medical Appeal Tribunal, ex p. Gilmore* [1957] 1 Q.B. 574; compare (1957) 20 M.L.R. 394.

[17] (1843) 5 D. 552. See also as to the finality of the " record," such cases as *Sitwell* v. *M'Leod* (1899) 1 F. 950.

In regard to inquiries, the processes of formalising them, and removing them from Departments is, relatively, carried further. Many of the proposals for greater openness at, and for greater definition of scope of, inquiries will be given a warm welcome. The proposal for an opportunity of correcting any statement of fact in the inspectors' report could be troublesome. Clearly some such principle as " competent and omitted " must apply, and it is difficult to see how in many cases corrections could be incorporated without in effect holding at least a partial re-hearing. The likelihood of this is increased since it seems that the portion of the report thus subject to challenge would include inferences of fact. On the other hand, too tight a control at this stage would be likely to revive present discontents. Both this proposal and that that the Minister's decision should set out his full findings of fact and reasoning, as well as be accompanied by the inspector's report, must be judged by the committee's rightful insistence on the peculiar " efficiency " of government—that not merely must governmental objectives be attained without undue delay but also that the general public must be satisfied that a reasonable balance has been struck between public and private interest. Here, what must be asked is whether the " customer " will be more satisfied if he is told that the facts are so and so, and while they may lead to conclusion A, yet reasons of policy lead to conclusion B. He may be more satisfied. On the other hand he may feel even more strongly than now that too little weight has been given to his factual evidence, which he regarded as compelling, simply because of the form of award. Too open diplomacy has not proved an unmixed blessing. Too open administration could also lead to difficulties. In this matter the analogy of ordinary litigation is not exact. The area of choice which remains to the judge after findings of fact have been made is much more limited, and his judgment is expected to fit an existing pattern. Since in this field there cannot be the sort of consistency which must be found in the courts, it may well be desirable to avoid procedures which would raise unrealisable expectations of such consistency and provoke disappointment when it was not achieved. While a good case can be made for a reasoned decision, over-elaboration of the decision can create new difficulties.

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[18] *Ante*, p. 19.

[19] Thus the committee had earlier emphasised (§ 112) " in some cases the point of law will be whether there was any evidence upon which the tribunal, properly directing itself, could have come to the decision." Such " points of law," unless rigidly controlled, can amount to too full a review of the sufficiency of the evidence to permit tribunals to achieve that purpose.

The absence of those restrictions which are inherent in ordinary judicial proceeding from the type of administrative " judgment " here in question may then mean that their form should differ. In one sense the proposals in the report create such a difference. The process of fact-finding is much more exposed to view under the scheme proposed. There is to be not merely a record of the judge's verdict but also a report of the debate in the jury room. Whether this is the right sort of difference to create is arguable. Not least of the advantages of the system of arbitration is the brevity and taciturnity of the arbitrator's award. That brevity is possible and acceptable because of the standing of the arbiter. If analogies are to be sought perhaps this should be considered as an alternative. It is possible that if the reforms of the earlier stages of the inquiry procedure, and of the methods of appointing inspectors, are carried out, enough will have been done. Those reforms, if coupled with some modification of the post-inquiry proposals, may be enough to secure the general acceptability which is desired. While that must be sought, there is danger in too hard pursuit. It is undesirable to make any procedure so complex from the administrative point of view that there would be a strong incentive to avoid it. Even from the point of view of objectors, the committee's intention may be frustrated by unduly prolonged procedures. Once again, however, the judgment passed upon the proposals depends upon a personal view of what is the proper balance in putting into effect principles which are at the same time desirable and conflicting.

Whatever the fate of this report, the committee deserves much gratitude for speed of action and for the lucidity with which the report emphasises the issues involved. Moreover, the committee's insistence that the whole of the governmental process is a collaborative one is a welcome and timely reminder both to those who administer and those who are administered. Yet even if the recommendations were wholly accepted and proved wholly successful the problems of administrative tribunals (in the broad sense) will still remain and there will be much to engage the attention of the councils. There is, for example, an outstanding problem in regard to evidence. In some matters there is a virtual monopoly of evidence by Government Departments or Government-controlled bodies, a monopoly which will become more significant with each development of atomic energy. There is similarly the problem of administrative finality. A successful objection to the proposals of authority A does not involve security against authority B.[20] The solution of such matters may, however, be more readily found in the more moderate and more practical atmosphere created by this report.

J. D. B. M.

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[20] Here cases such as *Liddall* v. *Ballingry Parish Council*, 1908 S.C. 1082, provide a possible starting point.

CURRENT PERIODICAL LITERATURE

By K. W. B. Middleton, b.a., ll.b., Advocate, Sheriff-Substitute of the Lothians and Peebles

VICARIOUS LIABILITY AND INSURANCE COMPANIES.

As Mr. T. L. Marriott showed in an interesting article recently in this *Review*,[1] the practices of insurance companies have definite, and complex, effects on the rules of legal liability in spite of the fact that courts of law refuse to admit that the question whether or not a party to an action is insured is relevant. It could not be otherwise when the great majority of accident cases which come to trial are fought by, and chosen by, insurers. The extensive development of the vicarious responsibility of employers, for example, could scarcely have occurred if it were not for the fact that employers can cover themselves by insurance. It would be an intolerable burden on them, as Winfield says,[2] unless they were able to do so. Judges being, in the main, human, it is too much to expect that they will not be in some degree consciously or unconsciously influenced by knowledge, or belief, that an insurance company is standing behind a litigant. But only that champion of unorthodoxy, Lord Denning, has openly avowed that he will not let himself be blinded by ignoring the insurance factor.[3]

Unfortunately the anomalies which result from the failure of the law to take account of the real state of affairs are now in general too deeply rooted for removal without legislation. A notorious instance occurs where a motorist driving his wife and family becomes involved in an accident causing injury to them through his negligence. The members of the family can recover in full from their father's insurance company, whereas his wife can obtain no compensation at all, at least under third-party cover, because of the rule that one spouse cannot sue another for damages.[4] If, on the other hand, a wife is a passenger in a car driven by her husband in the course of his employment, she may get compensation by bringing an action against her husband's employer.[5] Yet another obstacle, however, faces the wife. For the employer, having been found vicariously liable in damages to the wife, may then proceed to sue his employee, the husband, for relief. Or rather the employer's insurers, who have actually paid the damages awarded to the wife, may seek an indemnity from the husband by bringing an action against him in the employer's name.[6] Whether such an action against the husband will succeed may, however, depend on the particular terms of the motor-vehicle insurance policy.

It has for long been assumed, both in England and in Scotland, that a master, who becomes vicariously liable in damages for the wrongdoing of his servant, is entitled to relief against the servant.[7] But there is an almost complete lack of case law on this point, no doubt because masters have rarely desired, or thought it worth while, to sue their servants. It is fair enough, where the master has no insurance cover, that he should be entitled to relief, and indeed it would surely be the reverse of equitable if a master who was entirely free from personal blame had no right of recovering damages awarded against him from a culpable servant. It is true that the master is usually better able to pay, but that very fact is a disadvantage to him and an advantage to the servant when it comes to being sued by a third party. On the other hand, where the master is insured against third-party risks, the position is very different. The insurance premium is regarded by the master, if he is a business man, merely as part of the costs of his business. It is not of much consequence to him if he is sued for damages on account of the negligence of a servant. The latter, however, who will not normally be covered personally by insurance, may suffer a disaster if he has to relieve his master and bear the whole liability in the end of the day. It is all the more serious for the servant if the decision to seek relief from him is not taken in fact by his master but by an insurance company, quite unmoved possibly by considerations of benevolence or expediency which might restrain the master.

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[1] 1957 J.R., pp. 270 *et seq.*

[2] Winfield on *Torts*, 6th ed., p. 139.

[3] See *Romford Ice and Cold Storage Co., Ltd.* v. *Lister* [1956] 2 Q.B. 180, 191.

[4] *Harper* v. *Harper*, 1929 S.C. 220, S.L.T. 187.

[5] *Broom* v. *Morgan* [1953] 1 Q.B. 597; *Webb* v. *Inglis*, 1958 S.L.T. (Notes) 8.

[6] *Lister* v. *Romford Ice and Cold Storage Co., Ltd.* [1957] 1 All E.R. 125.

Some recent English decisions draw attention to the questions that may arise as between employer and employee from the rule of vicarious liability. In *Gregory* v. *Ford*[8] a cyclist, who had been injured owing to the negligent driving of a lorry, sued the owners of the vehicle and the lorry driver. The lorry at the time of the accident was not covered by third-party insurance because it was being used for carrying goods for reward, a use which constituted a breach of the conditions of the policy. Byrne J. held that the employers, although they did not owe a duty to the driver to insure him personally against third-party risks, were under a duty not to require him to do an unlawful thing, namely to drive an uninsured vehicle. They were not therefore entitled to an indemnity against him, while he was entitled to an indemnity against them. The ground on which the driver escaped liability altogether was that there was no evidence to show that he knew the particular errand on which he was engaged to be outside the limits of the insurance cover. A driver obviously cannot be expected to ask his employer, every time he is told to take out a vehicle, whether the journey is covered by insurance or not. If, however, the driver had been aware of the insurance position he might perhaps have been held partly liable in the damages.

This was the result which was reached in *Jones* v. *Manchester Corporation*,[9] a claim arising from the death of a patient in hospital due to negligence in the administration of an anaesthetic. The doctor who gave the anaesthetic, an employee of the hospital, and the hospital board were held jointly liable in the proportion of 20 per cent. and 80 per cent. respectively, in respect that the employers were entitled only to partial indemnity against the doctor immediately responsible, part of the blame for the patient's death being attributable to other employees of the board and therefore to the board vicariously.

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[7] See Batt on *Master and Servant*, 4th ed., p. 158; Fraser on *Master and Servant*, 3rd ed., p. 305; Glegg on *Reparation*, 4th ed., p. 408.

[8] [1951] 1 All E.R. 121.

[9] [1952] 2 Q.B. 852.

On the other hand, where an employer's responsibility is purely vicarious, or to put it more accurately, where the employer is involved only because of the relation in which he stands to the wrongdoing employee, the employee is liable in the whole damages awarded to the third party if relief is sought against him by the employer. This was held by Finnemore J. in *Semtex, Ltd.* v. *Gladstone*,[10] and his decision was approved by the House of Lords in *Lister* v. *Romford Ice and Cold Storage Co., Ltd.*,[11] a case which has aroused a good deal of controversy.

Semtex, Ltd. v. *Gladstone* was an action brought nominally by employers against their employee to recover a large sum of damages in which they had been found vicariously liable as a result of a traffic accident caused by the negligent driving of the defendant. The victims of the accident were other employees of the plaintiff company who were passengers in a car driven by the defendant. *Lister* v. *Romford Ice and Cold Storage Co., Ltd.* was a similar case, except that the injured employee, who happened to be the father of his fellow-employee, the negligent driver, sustained injury not on a road but in a private yard. A bare majority in the House of Lords, affirming a majority decision of the Court of Appeal, held that there was no implied term in the driver's contract of service that his employers would not seek indemnity against him in the event of their being made liable as a consequence of his negligent driving, and that they were entitled to recover from him the whole amount awarded to the injured person against them.

The insurers were not directly interested in *Gregory* v. *Ford*, since the vehicle was not covered by insurance at the time of the accident, and the insurance factor does not appear to have been mentioned in *Jones* v. *Manchester Corporation*. But in *Gladstone's* and *Lister's* cases the question of insurance was inextricably involved, and it is not possible to understand them without reference to this factor. There were two insurance policies involved in each case, one covering the employers' liability to their employees, the other excluding employers' liability and covering road traffic risks. The real plaintiff in both actions was the company which issued the former policy, exercising the right given to it by the terms of the policy to sue in the employers' name, and in *Lister's* case at any rate against the will of the employers. In both instances also the motor-vehicle insurance apparently included the usual clause extending the cover against third-party claims to other drivers driving with the insured's authority or permission. A clause of this kind, in conjunction with section 36 (4) of the Road Traffic Act, 1930, enables an employee, who has negligently injured a third party while driving on the authority of the employer, and thereby incurred liability personally, to have recourse directly against the insurance company for indemnity.[12] Accordingly, in effect the result of *Semtex, Ltd.* v. *Gladstone* was to transfer the burden of paying damages to the third parties from the employer's liability insurance company to the motor-vehicle insurance company. Finnemore J., while he emphasised that his judgment could not depend on the fact that the parties, or one or other of them, was protected by insurance, made no secret of his opinion that the defendant could obtain the benefit of the " other drivers " clause in the motor insurance policy and would not himself suffer loss. " Of course," he remarked, " it is obvious to anyone who uses his eyes in this court, apart from the evidence that was given, that, in the result, there is a contest between much more seasoned warriors than even Semtex, Ltd., or Mr. Gladstone. Behind the scenes are two well-known insurance companies. . . ."[13]

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[10] [1954] 2 All E.R. 206.

[11] *Supra.*

[12] *Tattersall* v. *Drysdale* [1935] 2 K.B. 174; *Digby* v. *General Accident Fire and Life Assurance Corporation, Ltd.* [1943] A.C. 121.

It is natural to suspect that rivalry, real or mock, between two insurance companies had more than a little to do also with *Lister's* case. Unfortunately it is impossible to discover from the report to what extent, if at all, the motor insurance company was concerned in this case. It may be, since the accident out of which the claim arose did not take place on a road, and was thus outside the scope of compulsory third-party insurance,[14] that the motor insurance company had no interest in the result of the action. This would seem to depend on the terms of the policy, which may or may not have excluded accidents occurring elsewhere than on a road. There was some discussion of the question in the Court of Appeal, but only in relation to an argument put forward for the defendant that the employers were in breach of a statutory duty to have him insured personally against third-party risks. This point, however, is plainly bad, since no such duty is laid on employers, and it was not pursued in the House of Lords. Some oblique references merely were made in the speeches of the law lords to the fact that the accident took place on private property. Is it possible, however, that dubiety on this point, and consequently on the chances of the driver's being indemnified by the motor insurance company, was not unconnected with the acute division of judicial opinion, in the House of Lords as well as in the Court of Appeal, in *Lister's* case? And if courts are influenced by factors which are morally though not legally relevant, is this either to be wondered at or condemned? Does it not show, however, that there is something wrong with the existing state of the law? It cannot be called a realistic attitude. To ignore the existence of a *dominus litis*, who hides behind the scenes and manipulates the nominal party to the action like a puppet, is to cling to the form of justice and abandon the substance.

Whatever may be thought of the desirability of the result reached in *Lister's* case, the arguments relied on by the majority in the House of Lords must be admitted to be strong. The implied term in a contract of service for which the minority contended, that a master who is insured will not seek an indemnity from his servant, is a very artificial conception, apart from the difficulty of setting precise limits to it. Lord Somervell thought that no driver would undertake the work if he realised that a negligent act or omission on his part might involve him in liability for crushing damages.[15] But, as is observed in an editorial note in the *Law Quarterly Review*,[16] this attributes to the ordinary driver a sense of prudence that is as admirable as it is unexpected. It is one thing to say that employers ought to make sure that their employees are personally covered by insurance when at work. It is another thing to say that employers and employees in fact enter into contracts on such a basis.

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[13] At p. 209.

[14] Road Traffic Act, 1930, s. 36 (1).

[15] p. 146.

[16] (1957) 73 L.Q.R. 284.

The importance of *Lister's* case, of course, is that it establishes a general rule of liability of servants to their masters, whether they are employed as drivers of motor-vehicles or in another capacity. Dr. Glanville Williams considers that the consequences of the decision are likely to be far-reaching, and hold possibilities of great hardship for employees, especially those who have accumulated some property.[17] Now that the House of Lords has spoken, the question has become one of legislative policy. Should the law as now settled be altered, and if so to what extent? The question, he believes, cannot be answered without discussing the theory underlying vicarious responsibility as well as the manner in which this kind of liability operates. After criticising the various grounds which have been put forward on behalf of the rule, he concludes that on the whole the best justification for it is the proposition that the liability of an employer may be regarded as a running expense of his business, the insurance premium being an item in his costs which he expects to pass on to his customers, who in the long run pay the damages in which the employer is found vicariously liable. The argument for vicarious responsibility is accordingly one of expediency or perhaps, looked at in another way, public policy. It is an argument which is often accepted nowadays. "A mixture of ideas has inspired many unconvincing judicial efforts to find a scientific basis for the maxim [*respondeat superior*]. . . . What was once presented as a legal principle has degenerated into a rule of expediency, imperfectly defined, and changing its shape before our eyes under the impact of changing social and political conditions."[18] According to this theory of vicarious responsibility, there is no room, Dr. Glanville Williams asserts, for allowing masters to indemnify themselves against their servants, and he thinks that they should be prohibited by legislation from doing so, at least where it is a question only of inadvertent wrongdoing on the servant's part.

The theory, sometimes called "the entrepreneur theory," which Dr. Williams favours does not really explain why a master should be vicariously liable, although it may explain why vicarious liability has been extended so far by the courts and by the legislature. It does not cover cases like that of domestic service, nor does it provide any reason for making the master liable only for damage resulting from the fault of the servant and not also for damage caused by the servant without any fault on his part. In any event, it scarcely follows in logic, because a master may insure against vicarious liability, that he therefore ought to do so, or, because in the long run his customers usually pay, that therefore they ought to pay. There must be some ground on which it is not merely expedient but just to make the master vicariously responsible. Plainly liability is not dependent on fault, for he is often made liable where there is no conceivable blame attaching to him, and he is not excused although the wrongdoing of his servant was wilful and contrary to his express instructions.[19] Nor can the master's liability be based on his power to control the servant. What control can the owners of a ship exercise over its crew? Nor again on the ground that the servant's wrongdoing is intended to benefit the master.[20]

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[17] "Vicarious Liability and the Master's Indemnity" (1957) 20 M.L.R. 220 *et seq.*, 437 *et seq.*

[18] *Kilboy* v. *South Eastern Fire Area Joint Committee*, 1952 S.C. 280, *per* L. P. Cooper, at p. 285, S.L.T. 332.

In *Broom* v. *Morgan*[21] employees were held liable vicariously to the wife of an employee, through whose negligence the wife was injured, although the wife could not have sued the wrongdoer directly. This decision gave rise to an academic debate as to the basis of the rule of vicarious liability.[22] It was maintained on the one side that the proper view is that the servant's fault is imputed to the master, the latter being held to be in breach of a duty owed by him, without regard to the liability of the servant. The argument on the other side was that the duty lies upon the servant, so that the master is not liable unless the servant is liable, subject to an exception in cases like *Broom* v. *Morgan* where the servant is immune from action. The former view has now been decisively rejected by the House of Lords in *Stavely Iron and Chemical Co., Ltd.* v. *Jones.*[23] It was there laid down that a distinction must be drawn between vicarious liability properly so called and the personal liability of an employer for the acts of his employees or agents. In the former case the master's liability depends on that of his servant, and if the servant is not liable neither is the master, subject to an exception where a special rule of law protects the servant, as in *Broom* v. *Morgan*, if that case was properly decided. On the other hand, where a duty is imposed directly or personally on the master by common law or statute, the master cannot absolve himself by delegating responsibility. It is incorrect to speak of the master's liability as vicarious in this respect, although it is sometimes so described, since it does not depend on the previous liability of the servant. There is some risk of confusion, however, in speaking of the master's duty as "personal," or "non-delegable." He often in fact does, or even must, delegate the duty to others, whether or not they are his servants. The point is that, although he can delegate *de facto*, he cannot delegate *de jure*, that is to say, he cannot by delegating his duty escape the responsibility that lies upon him.[24]

While the position of an employer who is personally liable in this way for the wrongdoing of another is distinct from that of a master who is vicariously liable for the wrongdoing of his servant, the basis of liability is, if not identical, at least analogous. In both instances a person who employs another person to do something for him becomes liable for the wrongdoing of that person, irrespective of the fact that he himself had no part in the wrongdoing. Thus both are instances of strict liability, and the difference between them is one of degree, the responsibility of a master, arising from the mere fact that he has entered into a contract of service with a servant, being less onerous than that of a master, or other person, who comes under a non-delegable duty. If it is asked why the latter should be liable for the wrongdoing of another although he has taken every possible care to prevent it, the answer is fairly simple. "A servant is not a mere machine continuously directed by his master's hand, but a person of independent volition and action, and the employer, where he delegates to him some duty which he himself is under obligation to discharge, must take the risk of the servant's action being misdirected when he is, for the time, allowed to be beyond his master's control."[25] The same principle applies when a master chooses to employ a servant to do his work for him, although no duty lies personally on the master to do that particular work. That this is the true basis of vicarious responsibility may be tested by considering in what circumstances a master is *not* liable for his servant's wrongdoing. He will escape liability if the wrong is outside the course of the servant's employment, that is to say outside the scope of what the servant was engaged to do. The maxim *qui facit per alium facit per se*, of which some people are so scornful, apparently on the assumption that anything said in Latin is not worth saying, expresses exactly enough the reason for liability arising from breach of a non-delegable duty. Understood in a slightly different sense, it also gives the reason for the vicarious liability of a master.

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[19] *Limpus* v. *London General Omnibus Co.* (1862) 1 H. & C. 526.

[20] *Lloyd* v. *Grace, Smith & Co.* [1912] A.C. 716.

[21] *Supra.*

[22] See G. Williams, "Vicarious Liability: Tort of the Master or of the Servant?" (1956) 72 L.Q.R. 552 *et seq.*; G. J. Hughes and A. H. Hudson, "The Nature of a Master's Liability in the Law of Tort" (1953) 31 Can.Bar Rev. 18 *et seq.*

[23] [1956] 1 All E.R. 403.

[24] *Wilsons and Clyde Coal Co.* v. *English*, 1937 S.C.(H.L.) 46; S.L.T. 523.

The vicarious responsibility of a master being a variety of strict liability, it is not alternative but additional to the primary responsibility which, according to the principle *culpa tenet suos auctores*, everyone should bear for his own wrongdoing. It is not disputed that the wrongdoing servant is, and should be, personally liable to an injured third party as well as his master. Dr. Glanville Williams goes no further than to suggest that the master's right of indemnity should be taken away. But this would still leave the servant exposed to an action against him by the injured party. Moreover, it might be inequitable to put such a burden on an uninsured master. The only tolerable change that could surely be made in the law would be to require a master to insure his servant against the consequences of his own negligence, and to give the servant the benefit of this cover.

Mr. J. H. Jolowicz[26] thinks that for masters to be required to insure their servants personally would be open to objection on the ground of public policy, an argument which carried weight in *Lister's* case, as appears from some opinions expressed in the Court of Appeal and the House of Lords. Would it be desirable, for example, that drivers of vehicles should be completely exempt from civil, as opposed to criminal, responsibility towards other persons on the roads? It is true that, as Dr. Williams points out, the purpose of the law of reparation is not primarily deterrent. It is to secure that persons who suffer damage may be compensated by someone, whether the wrongdoer or an insurance company matters not. Public policy does not demand that an owner-driver should bear the responsibility for his bad driving himself, and be prohibited from insuring against the consequences of his negligence. On the other hand, the owner-driver has inducements to drive carefully that an employee has not got, and must pay a premium that may be increased if he has an unsatisfactory record as a driver.

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[25] *Central Motors (Glasgow), Ltd.* v. *Cessnock Garage and Motor Co.*, 1925 S.C. 796, *per* Lord Cullen at p. 802, S.L.T. 563.

[26] "The Right to Indemnity between Master and Servant" [1956] C.L.J. 101 *et seq.*

On the whole, perhaps, the argument from public policy is not a very strong one, and it should not be allowed to obscure the good reasons that exist for providing servants as well as masters with insurance cover against liability to third parties. The question rather is, how is this desirable objective to be attained? Mr. Jolowicz thinks it preferable, instead of making it compulsory for masters to insure their servants, that arrangements for insurance should be made by masters by agreement between the parties, or through trade unions, when servants are engaged. But it seems doubtful whether effective steps in this direction are likely to be taken voluntarily, at least so far as ordinary wage-earners are concerned. Insurance companies do not normally, according to Mr. Marriott, exercise their right of indemnity against the employees of insured persons, and *Lister's* case was " a regrettable exception," for which possibly there were special reasons. Even if the employee is sued individually, or together with the employer, it is apparently not infrequent for the insurers to indemnify the employee in person, provided that the employer would, if sued alone, be vicariously liable. The fact, however, that claims for indemnity against employees will not usually be made does not alter the fact that the possibility exists, and without doubt great hardship may result in certain cases. Since voluntary arrangements for insurance of employees may not be generally practicable, we are obliged to conclude that legislation of some sort is called for.[27] But it would hardly be necessary or desirable to enact that every employee of every employer should be insured against claims by third parties. It would be sufficient probably to provide that, where an employer has entered into a contract with insurers for indemnity in case of liability arising from accidents to employees or other persons, insurance cover should be extended to his employees in respect of any liability incurred jointly with him.

So far as motor-vehicle insurance is concerned, the ordinary policy already does in fact provide employees with such cover through the " other drivers " clause, and an employee who is sued by a third party has a statutory right to claim indemnity directly from the insurers.[28] In cases not falling under the Road Traffic Act, 1930, a statutory provision of a similar kind would be needed, at least in England, in view of the absence of privity of contract between the employee and the insurers. It may be that in Scotland the employee would be held to have a *jus quaesitum tertio*.[29]

It was suggested by Lord Radcliffe in his dissenting speech in *Lister's* case[30] that, where the extension of cover to other drivers is provided in a policy, a servant driving a vehicle on his master's order is protected in case of an accident due to his negligence if he is sued by a third party separately, but not if his master is sued alone or jointly with him, for in the latter case the insurers, after satisfying the master's vicarious liability, can proceed to claim against the servant and so recover the money they have had to pay to indemnify the master. This would indeed be an " almost intolerable anomaly," as Lord Radcliffe observed. But surely the law, asinine as it may be on occasions, is not so asinine as all that. It is hard to see how the employee's right to indemnity can be affected by the order in which the injured party chooses to prosecute his claims, or how the insurers could repudiate their obligation towards the servant under the policy by using the purely technical device of suing him in the name of the master. If, as is thought to be usual, the cover is not restricted to the minimum requirements of section 36 (1) of the Road Traffic Act, 1930, the driver may apparently be protected even though, as in *Lister's* case, the accident did not occur on a road but on private property. Dr. Glanville Wiliams thinks otherwise, but his argument seems to be based on an unduly restrictive interpretation of section 36 (4) of the Act.

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[27] See Salmond on *Torts*, 12th ed., p. 146n.

[28] See section 36 (4) of the Road Traffic Act, 1930; *Tattersall* v. *Drysdale*, *Digby* v. *General Accident Fire and Life Assurance Corpn., Ltd.*, *supra*.

[29] See *Lindsay* v. *Robertson*, 1933 S.C. 158, *per* Lord Anderson, at p. 162, S.L.T. 121.

[30] At p. 141; see also *per* Lord Somervell at p. 147.

SUMMARIES

By S. G. Kermack, c.b.e., m.a., ll.b., Advocate, Sheriff-Substitute of Renfrew and Argyll at Oban

Administrative Law

Professor Wade gives an analysis of the report of the Franks Committee in an article entitled " Administration under the Law " in the *Law Quarterly Review* for October, 1957.

Professor Bernard Schwartz, who is an authority on the same subject in the United States, has reproduced in the *Canadian Bar Review*, Vol. 35, No. 7, the Memorandum which he submitted to the Franks Committee based on American experience.

Comparative Law

In the *Revue Internationale de Droit Comparé*, Oct.–Dec., 1957, M. Imre Zaytay discusses in what way comparative lawyers should approach the " reception " of foreign law, pointing out how frequent a phenomenon it has been. He has not extended his researches to Scotland, which might present an interesting example.

Professor Rudolf Schlesinger of Cornell University outlines in the *American Journal of International Law*, October, 1957, a new project which is being inaugurated at his university to study the " general principles of law recognised by civilised nations " and elaborates the ways in which its results might be productive in wider fields as well as in international questions.

Conflict of Laws

The *Canadian Bar Review*, Vol. 35, No. 6, devotes its whole issue, dedicated to Dean Falconbridge of Osgoode Hall Law School, to the Conflict of Laws, the sphere in which the Dean has long held a unique position. Mr. J. H. C. Morris of Oxford University has been chosen to deal with the Dean's own contributions to the subject, such as those on Renvoi and what is called "Characterisation." From the United States, Professor Yntema contributes a general thesis on the Objectives of Private International Law. A colleague of the Dean's, Mr. Ian Baxter, writes on Foreign Currency Obligations. For the other linguistic side in Canada, Professor Cartel of McGill contributes an article on the form of "*Actes Juridiques*" as governed by International Law. Finally, Mr. Gilbert Kennedy treats of the thorny subject of the Recognition of Foreign Divorce and Nullity Decrees. Such a collection of contributions forms an important and worthy symposium on the subject.

The modern tendency to recognise non-domiciliary decrees of divorce in England is analysed by Mr. P. R. H. Webb in *The International and Comparative Law Quarterly*, October, 1957, while the somewhat parallel question of the basis of jurisdiction in nullity is treated by Mr. Grodecki in the *Modern Law Review*, November, 1957. In contract law, Mr. Edvard Hambro discusses the Scandinavian States' approach to the subject.

The *Modern Law Review*, January, 1958, discusses the Bill introduced to implement the recommendations of the Royal Commission on Marriage and Divorce, drawn up by Lord Keith's sub-committee on divorce jurisdiction.

Criminal Law

The *Connecticut Bar Journal*, September, 1957, produces from the pen of Mr. J. E. Hoover an article on Juvenile Delinquency, and such a contribution from the Director of the F.B.I. is bound to carry weight. Professor Ryce of Seoul National University has an article in the *New York University Law Review*, November, 1957, elucidating the various theories held on the approach to criminal attempts, and advancing suggestions.

Mr. Hall Williams uses the attempt of the Wolfenden Report to formulate the function of criminal law as a text to define its scope and function as related to norms, in the January, 1958, number of the *Law Quarterly Review*.

Foreign Law

In the *New York University Law Review*, November, 1957, Professor Bernard Schwartz gives a penetrating though not entirely uncritical review of the recent work of the Supreme Court of the United States during this term. He sees President Warren's régime taking a somewhat different line from the 1937–55 one, particularly on alleged violations of individual rights. Students of this subject here can amplify this by reference to the fuller reports of such cases in the issues of the *American Bar Association Journal* of recent months.

International Concern

The *International Commission of Jurists* seem to have unearthed in the first issue of their *Journal* (Autumn, 1957), a new heading of legal topics with which lawyers should concern themselves because it is based on the Rule of Law. Theoretically it seems to fall somewhere between international law and comparative law. The Editorial by Mr. Norman S. Marsh defines the subject-matter. One of the topics dealt with from a critical though learned standpoint is the so-called " return to legality " of Polish lawyers. Another is the Soviet Procuracy, which is supposed to " protect " the individual by ensuring the " strict observance of the law." Going outside Europe, Mr. Gerald Gardiner, Q.C., deals with the Treason Trial in South Africa.

The *Canadian Bar Review*, October, 1957, contains a review of the initiation and programme of the work of the International Commission of Jurists by their President, the Hon. Joseph T. Thorman. A similar survey from a United States point of view is contained in the *American Bar Association Journal*, October, 1957, by the Chairman of the Association's Committee of Co-operation, Mr. Ernest Angell.

A factual picture of " The Campaign for Legality in the U.S.S.R." by Mr. A. K. R. Kiralfy, showing certain hopeful patterns, is given in the *International and Comparative Law Quarterly*, October, 1957, while Professor Berman in the *Modern Law Review*, January, 1958, in a lecture on Soviet Law and Government shows why that system, although tending to develop a mature legal structure, is by its nature prohibited from having a " rule of law " binding on its top members.

International Law

Professor Roberto Ago, of the University of Rome, reproduces in the October, 1957, issue of the *American Journal of International Law* an article on the definitions of " Positive Law " as bearing on international law, from the point of view of the principles of jurisprudence. The question is of course important, for the lack of the *indicia* of positive law as there defined was, as by Austin, used to deny the nature of law to international law.

Parliamentary Government

In *Public Law*, Autumn, 1957, Professor Mallory of McGill University presents a conspectus of the structure of Cabinet government in Canada. An interesting comparison of the respective positions of Parliament and Government in France and Germany is drawn by Professor Apelt of Munich in the October–December issue of the *Revue Internationale de Droit Comparé.*

Scots Law

Professor Mitchell of Edinburgh University in *Public Law*, Winter, 1957, adds an important contribution to our growing study of Scots constitutional law in discussing the question of Royal Prerogative in Scotland. The *Conveyancing Review*, starting its career in November, from which lawyers will expect much interest, opens with good discussions by Professor Halliday on *Ex facie* Absolute Dispositions and by Mr. J. R. Scott on possible confusion in modern times between Joint Property and Property held in Common.

Supranational Law

This new term, now coming into use and arising out of the existence of bodies which are the objects of neither national nor international law properly so called, seems to be justified. *The International and Comparative Law Quarterly*, October, 1957, discusses the integration of Europe as involved in the constitutions of the Common Market and Euratom authorities. Similarly, Mr. D. G. Valentine reviews the judgments of the Court of Justice set up for the European Coal and Steel Community, which has been in existence for four years, in the *Modern Law Review*, November, 1957. The text of the Treaties establishing the European Economic Community and also that establishing "Euratom," extending to some hundred and forty pages, is given in the *American Journal of International Law*, October, 1957.

Periodicals also received: *La Justicia*, *Jus* (Milan), *The Western Political Quarterly*, *The British Tax Review*, *The British Journal of Administrative Law*, *Anglo-Soviet Journal*, *Oklahoma Law Review*, *Revista Juridica de la Universidad de Puerto Rico*, *Revista del Foro* (Lima), *Documentation Juridique Étrangère* (Brussels), *Textes Législatifs Étrangers* (Brussels).

RECENT LITERATURE

Aspects of English Equity (Hebrew University of Jerusalem, Lionel Cohen Lectures, Second Series). By Sir Raymond Evershed, Master of the Rolls. 1954. Jerusalem: The Magnes Press. Price 5s. net.

The Lionel Cohen Lectures in the Hebrew University of Jerusalem were founded by Lord Cohen, Lord of Appeal in Ordinary, and the second series of three lectures were delivered by Sir Raymond (now Lord) Evershed in January, 1954, and are now reprinted. The subject is an appropriate one, since both Lord Cohen and the learned lecturer have been such distinguished practitioners and judges in equity.

The lectures are unfortunately flat and disappointing and contain nothing fresh or original in matter or exposition. They read poorly as compared with some of the series of Hamlyn lectures and the truth is that unless public lectures are really outstanding they are not worth reprinting; quite enough trite matter finds its way into print already. The first lecture discusses the origins and development of equity, stressing the great equitable invention of the trust (though it seems quite incorrect to say that it underlies the notion of the mandate, as applied by the League of Nations), and says something of the office of Master of the Rolls. The second lecture discusses some of the more important principles of equity by reference to the standard leading cases, while the third deals with equitable remedies, orders and procedure. His Lordship, at least at the date of these lectures, accepted that the Judicature Act, 1873, had effected a " fusion " of the procedural plane only.

It is difficult to judge what impact these lectures may have had on lawyers and students in Israel where knowledge of English equity may be neither deep nor extensive but it seems impossible to affirm that they contribute anything to knowledge in this country, nor can they be commended as a noteworthy presentation of the subject.

David M. Walker.

General Principles of Law. By Professor Giorgio del Vecchio. Translated by Felix Forte, with an Introduction by Roscoe Pound. 1956. Boston University Press, Boston, Mass., U.S.A. Price U.S. $3.50.

This little book is a translation by an Associate Justice of the Superior Court of Massachusetts, who was formerly a Professor in Boston University School of Law, of an Introduction to the course on Philosophy of Law read at the University of Rome in 1920. It takes the form, familiar to us from the Edinburgh edition of *Justice*, of short chapters followed by annotations as lengthy as the chapters themselves which indicate the width and scope of the learned author's scholarship. From the date of the work it is inevitable, though unfortunate, that these notes cannot come beyond 1920. The translation is very competently done and the text flows in easy idiomatic English.

In his Introduction Pound points out the opportuneness of a study of natural law at a time when interest in the idea has been reviving in America.

The argument of the essay starts from the premise that every judicial controversy is answerable, but where, in default of express legal provision, do we look for guidance as to the answer? To the general principles of law, says the Italian Civil Code. Only the jurist can find the fundamental general principles of the law, and one of these is the idea of natural law. This has two capital principles, equal liberty or the co-existence of free will, and that each limitation of personal right can be established only by law by an expression of the general will. From these principles flow other main principles and in modern Italian legislation principles of the law of nature can be seen in operation in the rule that law binds the State as well as the citizens, the principle of regard for human personality and the principle of freedom to contract.

As in all natural law thinking, there is a tendency in this essay to rely on generalities and ignore harsh practical difficulties. How, for example, does freedom of contract based on the principles of natural law square with the modern *contrat d'adhesion*, and does Italian, or any other, law really treat the State in exactly the same way as the citizens? Does the State not have some privileges and peculiarities? Nevertheless, this addition to the list of Del Vecchio's writings available in English can be welcomed as bringing out some of the points in which belief in natural law can justify positive rules.

David M. Walker.

A United Nations Peace Force. By William R. Frye. 1957. London: Stevens & Sons, Ltd. Price 30s. net.

Prepared under the auspices of the Carnegie Endowment for World Peace by the United Nations correspondent of the *Christian Science Monitor*, this short book explores the arguments for and against—naturally, mostly the former—the setting up of a permanent "Peace" (or Armed Police) Force to preserve the peace under the control of the U.N. General Assembly. It pays close attention to the practical problems and political difficulties in the way of the effective functioning of such a force. The title may mislead. This is *not* yet another pacifist or world governmentarian argument for the placing of a monopoly of armed force in the United Nations. Nor is it even a plan for the future use of national armies on a massive scale under U.N. titular command, as happened in Korea. The author's inquiry is limited to a Peace Force of much less pretentious—and hence more probably attainable—dimensions. What he has in mind is something on the lines of the present U.N. Emergency Force (in Egypt), limited to a few thousand men, supplied by those Member States—other than the Big Five, which, he convincingly shows, must be firmly excluded—willing to do so, rather than by direct " international " volunteer enlistment, which would involve insuperable practical, legal and financial snags. He does not envisage the present Emergency Force as continuing, but nevertheless shows how many valuable lessons have been learned by this experience. The early chapters (I–III) retell the story of its creation in a few days from absolutely nothing—a lesson to those who decry the United Nations as incapable of swift action. His compelling conclusion is that, if so much was achieved so quickly from scratch, great things might be expected from a *planned* Peace Force, not necessarily permanently embodied, but having a clear, detailed mobilisation plan and a nucleus staff cadre at the U.N. Headquarters in New York. It could be used as a " trip-wire " on a troubled frontier, or to supervise a referendum or to implement an already agreed " Cease Fire," as happened in Egypt.

The book is marked throughout by the practicability and, one may add, the modesty of its proposals. Sound common sense is apt to be rare among the advocates of international collaboration in the " peace " field. Nowhere does the author envisage the use of the proposed Force without the consent of the territorial Power—a blunt recognition of the actuality (however regrettable) of State sovereignty, but he shows that the mere fact that such a Force was in being, or could be embodied in a few hours, might well deter the small-State aggressor. It is tempting to speculate on what would have been the result in Hungary if Mr. Nagy's short-lived Government had been able to call in such a Peace Force. Even the U.S.S.R. is very sensitive to neutralist opinion—particularly in Asia—and might have called off the counter-revolution if the alternative had been to wipe out a U.N. Force, however small or ill-equipped. The author sagely remarks that " one indication that a permanent peace force would be an asset to the free world is the fact that the Soviet Union is strongly opposed to the idea " (p. 95). On one point he is brutally frank: " such a force would have to be financed in large part by the great Powers—that is to say, by the United States—because there is no other place where sums of money in nine or ten figures may be found " (p. 105). He considers whether the American taxpayer (by no means so golden a goose as some foreigners imagine) would be prepared to foot the bill. Insurance plays a very important part in the American Way of Life. This would be an insurance against small wars, which, we all know, may be the spark setting off a nuclear bush fire.

The author's text covers only 107 pages, the remainder—as long again—consisting of special Appendices by experts in the political, legal and military fields, which go into more detail than he does. Making some slight allowances for the fact that it was an " urgency " project, this is a most worthwhile study of a topic of paramount importance and deserves to be examined with close attention—most of all by the U.N. General Assembly itself.

C. d'OLIVIER FARRAN.

Baron David Hume's Lectures, 1786–1822. Vol. V. Edited and annotated by G. Campbell H. Paton, M.A., LL.B., Advocate, Lecturer in the History of Scots Law in the University of Glasgow, 1957. Edinburgh: The Stair Society.

The Stair Society has now published the fifth and penultimate volume of Baron Hume's *Lectures*. The editorial work has been carried out once again by Mr. Campbell Paton. It suffices to say that he maintains the high standards of accuracy and scholarship which he set for himself in the preceding volumes. The present book contains Baron Hume's Lectures on heritable and moveable succession, tailzies, apparency, the service of heirs, jurisdiction, and some aspects of the law of procedure. The sheer bulk of its three hundred and fifty-two pages is at first forbidding, but there is much to reward the reader whether he be lawyer, historian, or simply Scotsman.

Hume wrote at a time when the feudal law of Scotland had reached its zenith and his treatment of heritable property, continued in this volume, is conceived on appropriately majestic lines. The law of intestate succession to heritage was simple and well established, but that of testate succession was complicated by the efforts of lawyers to circumvent the rule that heritage was not carried by a will, and by the many complexities of the law of deathbed. The subtleties of this now obsolete law become as clear to today's reader as they did to yesterday's student. Tailzies played an important part in the maintenance of the then order of society, and nearly a hundred pages are devoted to their intricacies. More interesting to the modern reader is the chapter on the service of heirs. The legislative innovations of the nineteenth century have tended to obscure the fundamentals of this process, and Hume's remarks, particularly on general services, might well be compulsory reading for the student of today. His chapter on moveable succession includes important dicta on the nature of the rights of *jus relictae* and *legitim*. Hume declared that the former was "in no wise a right of succession or representation of the deceased. It is a claim of partition rather, which belongs to her in her own proper and original right. The goods in communion (so the term itself indicates) were the common property of her and her husband, during the marriage; and the change which takes place on his death is to this effect only, that her interest, which had formerly lain dormant under the powers of the husband as administrator, now revives, . . . and produces a partition of this common fund and estate" (pp. 163–164). *Legitim*, on the other hand, Hume regarded as a claim for debt (p. 171). The law of jurisdiction has not changed much since Hume's time, and his chapter on it has a deceptively modern appearance. If we are reminded of the period when Hume wrote by the references to Border warrants, there is a certain topicality about what Hume calls the jurisprudence of Gretna Green. In his day, however, the problem was rather whether jurisdiction might be assumed in matters of divorce than whether eloping couples could marry in Scotland. His cautious analysis of the case of *Lolley* (p. 257) gives us some idea of the contemporary Scots lawyer's attitude to this remarkable decision, and reminds the reader that scattered throughout Hume's Lectures are many valuable observations on private international law. The chapter on moveable succession, for example, not only refers to its foreign aspects, but contains an incidental discussion of the concept of domicile (pp. 175 *et seq*.). After dealing with the courts, Hume considers some aspects of the law of procedure and evidence. Our law then stood at the close of a long period of adherence to the Romano-canonical tradition. The perusal of Hume's dispassionate and lucid description of the law is here, as in many other domains, a useful preparation for the study of its earlier features. Not least in this lies the value of the present publication.

A. E. Anton.

The Parliament House Book, 1957–1958. Two Volumes. 1957. Edinburgh: W. Green & Son, Ltd. Price £4 net.

The Parliament House Book for 1957–1958 shows the effect of all statutes which received the Royal Assent on or before August 1, 1957.

The principal new material incorporated in this edition consists of the Rent Act, 1957, the Cheques Act, 1957, and the revised Table of Fees for Conveyancing and General Business. The Rent Act is printed in Division L (Landlord and Tenant) and the effect of its provisions has necessitated the revision of that Division and of Division K (Valuation and Rating). Practitioners will find it a great convenience to be able to refer so easily to the Rent Restriction legislation as amended to date.

The legal profession should be grateful to the Editor for discharging once again the laborious and exacting task of providing an up-to-date compendium of statutory enactments and of other useful information. Both he and the publishers are to be congratulated on the promptitude with which this 133rd annual volume of *The Parliament House Book* has appeared.

D. W. R. B.

Constitutional Laws of the Commonwealth. By Sir Ivor Jennings, K.B.E., Q.C., LITT.D., LL.D., F.B.A. Volume I: The Monarchies. 1957. Oxford: The Clarendon Press. Price £2 10s. net (in U.K. only).

It is a mark of the difficulties with which the author had to contend, and not a failing of the book, that by the time it was published the title had become slightly inaccurate. One of the Member States included in this volume had already written itself into the projected second volume on the republics. Change happens so rapidly at present in the Commonwealth, that such accidents are inevitable, but that rapidity makes a survey at any point of time the more valuable. In form the present volume resembles the earlier ones under the name of *Jennings and Young*, the change of title being amply explained in the Preface. This edition contains valuable new material, notably the two South African cases, *Harris* v. *Minister of Interior* and *Minister of Interior* v. *Harris*, which have done so much to re-awaken discussion over the sovereignty of Parliament and the problems of judicial review. In substance there is perhaps a deceptive appearance of little change in the introductory essays. Yet incidental amendments are there, incorporating recent events and in other cases, such as the passages on the unity of the Crown and on the Statute of Westminster, 1931, there has been substantial re-writing with happy results.

As it stands then the book retains or regains all its old value as an introduction to the study of the constitution of the Commonwealth and of its Members. That is a considerable achievement. It is not easy to keep such an introduction within reasonable compass, nor is it easy to write on the subject at the present time without giving an unwarranted appearance of certainty or fixity. The achievement of the one and the avoidance of the other have been combined with many incidental but stimulating sidelights on constitutional law in general. Nevertheless there are matters which might be considered in the preparation of future editions. The beginner having been introduced to the subject, may be uncertain how to proceed, and the book might perhaps help him more. Some guidance to periodical literature, both general and particular, would be welcome. References to the articles on the use of legislative history in interpretation, which appeared in the *Canadian Bar Review*, as well as to some of the purely constitutional articles in that journal would help the student on his way. Similarly references to such collections of essays as there are on the Australian constitution would do something to bridge the gap. On cases there is more difficulty. Cases of the outstanding importance of the *Harris* litigation are rare, beyond those it is hard to draw a line. Nevertheless the *State Banking Case* (1947) 74 C.L.R. 31 might find a place even at the cost of shortening the extract from the *Bank Nationalization Case* which is more readily available here. Some extract, too, might appear from *Hughes and Vale* (*Pty.*) *Co.* v. *The Commonwealth* [1955] A.C. 241 to mark a further stage in the struggle over freedom of trade and intercourse. Yet, whatever suggestions are made it must be readily conceded that as it stands this book still has all its original utility and importance.

J. D. B. MITCHELL.

Modern Equity. By Harold Greville Hanbury, D.C.L., Vinerian Professor of English Law in the University of Oxford. Seventh edition. 1957. London: Stevens & Sons, Ltd. Price £3 15s. net.

To have achieved a seventh edition in just over twenty years is sufficient guarantee of the qualities and merits of this book. But the present edition is not simply a revised version of what has come to be an accepted textbook. For the learned author has "embraced wholeheartedly the view that it is an anachronism to speak of the Judicature Acts as having merely worked a revolution in adjective law. Their achievement may now with propriety be called the fusion of the systems of law and equity themselves." This being so, is there any justification for continuing to publish a book on Equity, or should there not be only, as indeed there are, books on Contract, Real Property, and so on, which state both the rules derived from common law and those derived from equity? The learned author accepts the difficulty, but contends that equity can still profitably be studied as a homogeneous whole and that (p. 40) only if it is studied as a separate subject can we "comprehend the nature of the operation whereby, within the framework of the totality of the legal system, there has been engrafted on to the rules of technical exactitude the principles of a morality which it has been found practicable to translate into rules of law."

With all deference this does not seem very convincing. Clearly historical study must take account of the achievements and influence of the separate systems but it does not follow that it is necessary or useful to study equity as a separate subject today. Subjects now require to be studied not according as they were formerly developed by the equity courts or are at present assigned to the Chancery Division but according to their place in an analytical classification of the main branches of English law, and in each subject account has to be taken of the contributions to its development made by common law, equity, legislation and other formative influences. Apart from the trust, are there now any wholly equitable topics of English law? Rather has equity supplied doctrines, ideas and principles to other distinct branches of law. On the whole, accordingly, it seems to the reviewer that the learned author is trying to ride two horses simultaneously, one the thesis that equity is now fused with law, the other that equity is a separate subject of study, and that this book may have to be transmuted in a later edition from *Modern Equity* to *Equitable Principles in Modern Law.*

However that may be, this change of view has naturally resulted in material changes in the text, more sweeping than any necessitated by the progress of legislation and case-law. Thus the chapters on the maxims of equity and the relations of equity with common law have been replaced by chapters on equitable ideas in property and equitable ideas in contract. Both are good and a great improvement on the superseded chapters, not least because they have shed the pre-1875 aura which invested all discussions of these topics. Of course the maxims are referred to at many points as providing a convenient pithy justification for the equitable attitude on some matter but they have long ceased to justify their place as the start and foundation of the study of equity.

Another new chapter is on declaratory judgments in which it is interesting to notice the influence of imitation of the Scottish declarator, and there is a more extended treatment of the difficult subject of licences. Apart from these more drastic changes there has been the customary process of taking account of developments and changes in the law and incorporating these in the text, a wearisome task but one faithfully performed. From the practical angle *Modern Equity* has been fitted for a further lease of life and it can be left to the academics to dispute whether it is entitled to live or not.

David M. Walker.

Some Comparative Aspects of Irish Law. By Alfred Gaston Donaldson, LL.B., PH.D., Barrister-at-Law. 1957. London: Cambridge University Press. Price 45s. net.

In this readable book Dr. Donaldson effectively refutes the jibe that the chief interest of Irish law is how it came to interest anybody. Modern Irish law lacks any of that idiosyncrasy which makes Celtic law find favour with sociologists and their kind. For this the blame attaches less to the Irish themselves than to those who thrust English law upon them. Since the departures from English law are few, the substantive law of Ireland is of only secondary interest to the foreign lawyer. Recognising this, Dr. Donaldson concentrates rather upon Irish constitutional law and history. The only chapter unconcerned with public law is that dealing with Irish land law, a topic of some interest to the Scots lawyer, since the problems of Irish land tenure are the problems of tenure in any community of small-holders. The agitation which led to the appointment of the Crofters' Commission of 1883 was directly influenced by the course of events in Ireland, and Irish influence is obvious in the drafting of the Crofters Holdings (Scotland) Act, 1886, and other crofting legislation. Dr. Donaldson, however, is mainly concerned with the legal framework of Ireland's relationship with England. This relationship posed and continues to pose problems similar to those occasioned by Scotland's relationship with England. Anyone interested in the political future of Scotland will find much to provoke thought in Dr. Donaldson's learned and dispassionate study of Anglo-Irish constitutional developments.

A. E. Anton.

Conveyancing Practice According to the Law of Scotland. By the late John Burns. Fourth Edition by Professor Farquhar MacRitchie, M.A., LL.B. 1957. Edinburgh: W. Green & Son, Ltd. Price £7 7s. net.

It is never easy for a new editor to produce a fresh edition of an established classic in any field of law, but when the work is one of such far-reaching scope and marked individuality as Burns's *Conveyancing Practice* the task is peculiarly formidable. For the late John Burns, following the tradition of great Scots conveyancers, did not content himself with providing merely the styles of deeds, but dealt comprehensively, and often penetratingly, with the background of law essential to their preparation. The text (including forms) of the new edition runs to nearly 900 pages, and the first reaction of the careful reader is one almost of awe at the magnitude of the labour involved and the diligence and care with which Professor MacRitchie has discharged his task. The well-thumbed, often rebound, copies of the 1926 edition which stand upon the handiest bookshelf of almost every legal office in Scotland have for many years now pointed to the need for a fresh edition, and the legal profession is indebted to Professor MacRitchie for satisfying it with a production of first class quality.

Not the least difficult decision for a new editor is to determine when he should content himself with excising the obsolete and adding the new and when it is desirable to rewrite sections completely. In his preface Professor MacRitchie makes it clear that he has in general confined his efforts to bringing the text up to date and pruning the styles in the light of current requirements, and on the whole there is no doubt that he has chosen wisely. To conveyancers who have become accustomed to Burns's resolutely practical approach, the direct plunge *in medias res* and the helpful opinions on matters not governed by decision, the preservation of these characteristics is a pleasant reminder of an old and good companion, and the retention of the familiar order of treatment of the various subjects makes it easy for the practitioner to find his way to any particular topic. Nevertheless, where extensive rewriting has been found necessary, as in the treatment of agricultural leases (pp. 622 *et seq.*), the clarity and accuracy of the new text is such as to make this reviewer regret that Professor MacRitchie did not permit himself more latitude in recasting other parts, *e.g.*, the notoriously difficult paragraph, substantially repeated on p. 312 of the new edition, regarding sales by trustees who do not have express power conferred in the trust deed. The work of introducing new statutes and decisions has been thoroughly done, and it is interesting to note here and there how the opinions expressed in the previous edition have been substantiated by court decisions, *e.g.*, the wider powers of the court under section 5 of the Trusts Act, 1921, as compared with the 1867 Act, to which Burns drew attention in the 1926 edition, have now (p. 313) been exemplified by the decisions in *Conage's J.F.*, 1948 S.L.T.(Notes) 12 and *Tennent's J.F.*, 1954 S.C. 215, S.L.T. 161. Where, on the other hand, recent decisions have rendered questionable views previously stated, the effect has been carefully noted and the text appropriately altered, *e.g.*, the implications of the decision in *Sutherland* v. *Garrity*, 1941 S.C. 196, S.L.T. 219, as affecting the former view that a notice of title in favour of an heir was sufficient without its warrant, have resulted in the paragraph on production of warrants (pp. 203, 204) being completely recast.

There is, however, much that is entirely new and valuable in the 1957 edition. There has been added to the chapter on Execution of Deeds an admirable précis of the law from a conveyancing standpoint of the execution of Holograph Writings, Testamentary Writings, Holograph Wills and Privileged Writings. Presumably these were previously excluded as not forming part of normal conveyancing *practice*, but they provide regrettably familiar *problems* in every legal office, and the lucid summary of the law as to their execution is unquestionably a valuable addendum to this comprehensive volume. A short but convenient list of matters to be arranged between seller and purchaser in a transaction for the sale of house property has also been introduced (at p. 341). The statutory network which in recent years has further enmeshed the hapless landlord of agricultural subjects, culminating in the Agricultural Holdings (Scotland) Act, 1949, has necessitated the introduction of a section on Agricultural Leases with new styles of Leases, Conditions of Let, Agreements, etc. The text is concise but lucid and the forms provided bear the mark of the expert. This section forms probably the most valuable single contribution to the new edition and will be warmly welcomed by all those whose practice lies to any extent in this difficult and highly technical field.

If any of the styles in the 1926 edition failed to find general acceptance in the profession, it was the group of will forms. Although the forms were sound and comprehensive there was ground for the criticism that in some respects they were unnecessarily lengthy. Professor MacRitchie has substantially reframed the styles of wills with some economy of wording and the addition of new forms, *e.g.*, to avoid double death duties and cover the case of common calamity (p. 800), to provide for cremation (p. 816), etc. The new clauses have evidently been prepared with great care and, as one would anticipate, exhibit draftsmanship of a very high order: practitioners would be well advised to review the forms hallowed by usage in their own offices by reference to these modern styles.

It is inevitable that in a work of such range there should be a few minor matters of criticism. In the style of partnership for medical practitioners (p. 112), one would have preferred a form adapted to the now much more common case of medical partnerships under the National Health Service based on the Memorandum prepared by the General Medical Services Sub-Committee for Scotland rather than a repetition of the style given in the previous edition incorporating provisions as to goodwill which in National Health Service practices are now *verboten*. The radical changes regarding the rights to coal and mines of coal and consequential rights of support under the statutory code commencing with the Coal Act, 1938, would appear to merit fuller and more explanatory treatment than they receive in the text (p. 225), and the form of mineral reservation clause might, as is now most usual, have been amended by the inclusion of a reference to the rights of the National Coal Board rather than by the mere deletion of references to coal. In an era where the "break-up" of tenements by sales of individual shops and houses forms an increasing part of the work of most conveyancing departments it would have been of advantage if space could have been found, even in this already massive volume, for a style or styles of a Deed of Declaration of Conditions. These are matters, however, on which there is room for difference of opinion, and it is appreciated that high printing costs nowadays are a restrictive factor upon every editor of a volume of styles.

It remains to commend the improved Table of Cases (which now gives full citations), the useful addition of a Table of Statutes and the excellent Index, each indicative of the immense labour that has been spent upon the book. The publishers and the printers too are to be congratulated upon the appearance of the volume, the clear headings and the excellence of the printing throughout, which make it a pleasure to read and to handle.

Altogether, it is a worthy successor to the editions which have preceded it, and to the thousands of Scottish lawyers who have used and appreciated them there can be no higher commendation.

John M. Halliday.

The Church in the Isle of Man. By Anne Ashley, M.A., Borthwick Institute of Historical Research. St. Anthony's Hall Publications, No. 13. 1958. London and New York: St. Anthony's Press. 3s. 6d. net.

Miss Ashley is well known to readers of *The Juridical Review* for her articles on "Property in relation to Marriage and the Family"—see 65 J.R. 37, 150, 262—in which she, *inter alia*, compared the law of the Isle of Man with that of Scotland. This latest publication—brief, and lucid and readable—though dealing more with ecclesiastical history, has none the less interest for the lawyer. Man, though for long now linked to England, was at one time within the Norwegian orbit and for a time came under the rule of Bruce, Bernard de Linton, the famous Abbot of Arbroath, being bishop of the island in the early fourteenth century. Those interested in Orkney and Shetland and the Udal law will find much to interest them in respect of the former period.

The church officials and courts are dealt with and those courts were early, says Miss Ashley, "more like those in England and Scotland than any contemporary Norwegian judicial assembly." Wills (of movables) were in existence; and, as in Scotland, these courts dealt with the administration of moveable succession. Both civil and church courts evolved from *things* or gatherings or assemblies and this had important effect upon jurisdiction and other matters. In the eighteenth century, at any rate, the civil courts could reverse the judgments of the church courts; and the former with their picturesque deemsters are briefly mentioned by the author.

G. C. H. P.

An Introduction to Company Law. By J. A. Hornby, M.A., LL.B., Barrister-at-Law, Lecturer in Law at The Victoria University of Manchester. 1957. London: Hutchinson & Co. (Publishers), Ltd. Price 18s. net.

The ordering of business life through the system of the Joint Stock Company is in the gross now dominant. The preface of Mr. Hornby's book specifically vouches this fact. The number of persons employed therein administratively is consequently very large. Most of these persons are concerned to understand the legal background of their day-to-day activities and problems. To them an outline systematically expounded—in a framework both chronological and logical—of that background has an obvious utility. In England such systematic treatment of company law by outline at academic or student level, and which meets this need, has hitherto seemed somewhat to seek. Appropriately, the writing of this Introduction is by one accustomed, as a University teacher, to this approach. The result, in the opinion of this reviewer, himself experienced in this activity, is eminently to be approved.

The text is written with notable clarity, order and grace of diction, and the flow of the narrative is preserved by a very sparing reference to judicial decisions and the use, as illustrations of principles, only of the essential facts, and, by apposite quotations from the opinions, the reasons of leading cases. In a book having this type of purpose the emphasis on principle rather than precedent—a Scottish more than an English habit—is altogether to be commended.

The book is written for the student of English company law and the law of Scotland is by no means in every respect identical; but it is observed that Scottish decisions are noted on points not yet considered by the courts in England, as in footnotes 12 and 13 on page 150, in considering recent legislative changes affecting "majority rule."

One, and it is thought the only, incorrect or misleading statement in the text is on page 71, where the learned author purports to say that the purchase by a company of the shares of one of its members, while a reduction of capital, does not come within sections 66 to 71 of the Companies Act, 1948, dealing with reductions of capital. But it is surely the law that in terms of section 66 it, and consequently also the ancillary sections which follow, covers reductions made "in any way."

J. A. L.

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(*A later review is not precluded, especially where books are received shortly before going to press.*)

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Clerk and Lindsell on Torts. Third Cumulative Supplement to the Eleventh Edition. By F. Maurice Drake, M.A., Barrister-at-Law. The Common Law Library, No. 3. 1957. London: Sweet & Maxwell, Ltd. Price 6s. 6d. net.

Chitty on Contracts. Third Cumulative Supplement to the Twenty-first Edition. 2 volumes. By F. Maurice Drake, M.A., Barrister-at-Law. The Common Law Library, Nos. 1 and 2. 1957. London: Sweet & Maxwell, Ltd. Price 6s. 6d. net.

Parliamentary Sovereignty and the Commonwealth. By Geoffrey Marshall. 1957. Oxford: At the Clarendon Press. Price 35s. net.

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Income Tax Law and Practice. By Cecil A. Newport, F.A.C.C.A., and H. G. S. Plunkett, Barrister-at-Law. Twenty-seventh Edition. Supplement to August 1, 1957. 1957. London: Sweet & Maxwell, Ltd. Price 3s. 6d. net.

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Charlesworth on Negligence. First Supplement to the Third Edition. By J. Charlesworth, LL.D. The Common Law Library, No. 6. 1957. London: Sweet & Maxwell, Ltd. Price 6s. 6d. net.

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The Constitutional Law of Great Britain and the Commonwealth. Second Edition. By O. Hood Phillips, M.A., B.C.L.(Oxon), Barrister-at-Law. 1957. London: Sweet & Maxwell, Ltd. Price 45s. net.

Leading Cases in Constitutional Law. Second Edition. By O. Hood Phillips, M.A., B.C.L.(Oxon), Barrister-at-Law. 1957. London: Sweet & Maxwell, Ltd. Price 38s. 6d. net.

Protection from Power under English Law. By Lord MacDermott. Published under the auspices of The Hamlyn Trust. 1957. London: Stevens & Sons, Ltd. Price 16s. 6d. net.

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Plain Tales from the Courts. The Reminiscences of the late Sheriff W. Jardine Dobie, LL.D. 1957. Edinburgh: W. Green & Son, Ltd. Price 25s. net.

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The Sanctity of Life and the Criminal Law. By Glanville Williams. 1958. London: Faber & Faber, Ltd. Price 30s. net.

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JURIDICAL REVIEW

ATTRITION OF STATE POWERS IN FEDERAL NATIONS *

I

IN government man is always hoping to reach opposite and inconsistent ends. He prizes predictability, precedent, a system of life in which the values of yesterday may be expected to obtain tomorrow ; and yet he is forever restless under the control of a dead hand, always fretful for progress, for the chances of change. He claims freedom for himself, liberty to do as he pleases ; and yet he needs order, restraints, a society in which man in the aggregate controls man the individual. He talks of a government of laws and not men ; but he is perpetually eloquent on man's need of individuality, on the intolerable quality of a government that fails to take account of each man's difference from his neighbour ; he cries out against any concept that society is an aggregate of robots, interchangeable integers as like one another as the same spare parts of a thousand identical television sets.

So, too, for greatness and smallness of man's government. He sees, dimly or clearly, the surge of population increasing and multiplying, replenishing all the good places of the earth and more, feeding itself only by vast and intricate apparatus. He realises that the immense undertakings required for mass existence—the construction of cities, great roads, dams, canals, ships, armaments—all are possible only by human organisation on a huge scale. His devices call for the marshalled resources of a continent, not merely the spare labour of a city state. But when he has accomplished all his marvels of aggregation he is dissatisfied,

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* Being a lecture delivered in the University of Aberdeen, St. Andrew's Day, 1956.

because what he has made is too large for him. He loses any sense of effectiveness in the control of his own fate. He is forlorn because the crowd is too big.

A federal nation is an attempt to reach a satisfactory compromise between these two necessities; like all compromises, it achieves neither end perfectly. And like all governmental institutions, it continually changes, and its substance changes faster than its form. Man clings to his accustomed terminology long after the things his words once described have become unrecognisable. Perils which he once so feared that he fixed constitutional barriers against them may have disappeared long ago, but the constitutional guarantees remain and he fights to keep them. Concepts of the operation of government, sometimes repeated without much thought, may continue to occupy man's mind long after the essence has gone. The Tenth Amendment to the United States Constitution, adopted in 1791, provides:—"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." It is still the orthodox statement of our "States' Rights." One can speculate, a little wryly, on how much of the original American concept of local government is really left unimpaired save for the powers essential to handle foreign relations in war and peace, and to regulate those phases of the economy which involve national and not merely local interests. As late as 1953 there was published a conspicuous book on American constitutional government, centred on the theory that only limited economic power is today vested in the Government of the United States[1]—a thesis odd to most observers who see the federal government occupying itself with control of wheat growing, and regulation of the wages of a man who operates a passenger elevator.

Federalism is a popular idea in our time. We hear of projects to join together various governmental entities in Africa to make viable and powerful nations. There is talk of an Arab federation including parts of the Middle East. In various forms a federated western Europe is under construction, and indeed in the essentials of military organisation, and of the economics of coal and steel, it is even now considerably advanced. The idea of such unions is perennially attractive to their sponsors, because they offer hope that in whatever respects a component State wishes to remain as it is, it may so remain, free to go its own way; but in those matters requiring the aggregate of the power of several States to accomplish the massive undertakings of our time the several States may have the advantages of united greatness. Federalists are forever hoping for means to eat their cake and have it too.

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[1] W. W. Crosskey, *Politics and the Constitution in the History of the United States.*

Reasoning from analogy is always properly suspect, in constitution-making as anywhere else. Australia's problems and prospects are not a sure basis of prediction for a federated Nigeria. Neither Canada nor the United States is a wholly reliable analogue for a European Community of Nations. To join, in an effective and lasting union, a group of States with different languages, different racial stocks, different economic levels, different habits of life and government, having thousands of years of separate history behind them, is a task far more difficult than making a solid nation by federating a few new and pioneer States separated by oceans from their parent countries. But still the prospect for new federal organisations can be guessed at better by comparison with existing forms than otherwise; and here I propose a little general consideration of the direction of change in the constitutional government of the United States of America since its independence, to see if any useful conclusions of general application for other nations are there to be found. In particular I am interested to wonder about the permanence of the federal form of government. Is it viable? Are those of us who enjoy the thought of smallness in governments (and I am one)—are we merely clinging out of sentimentality to a pattern of rule which is inconsistent with great intricate human organisations? Is time on the side of the bigger battalions? In the United States we have since 1789 seen a number of national troubles with which we have coped only by sacrificing our discrete government. We have seen this change forced when we found it necessary to organise the nation for war; when we have faced modern economic danger; when we have found it necessary to conduct our foreign relations by effective international agreements. We are, as these words are written, engaged in extending our central national power into matters traditionally considered reserved to the States, to correct what to most of the nation seems intolerable local injustice to negro residents. Each time the federal form of organisation is severely strained we seem to turn to more centralised government. What conclusion should an observer of governmental systems draw from this repetition of experiences? Can any warning stem this tide? Is resistance useful; and if so what form should it take?

II

The first requisite for survival of any nation still seems today, as it has been throughout all man's history, the capacity for successful defence in war. In a federal nation this at once presents problems of centralisation. During the American Revolution the dependence of General Washington for troops and munitions on the voluntary action of the several States sometimes seemed desperate. Even as late as the Civil War of 1861–1865 the State governments played a large part in raising and equipping Union regiments. By 1917 a carefully administered and efficient national draft was generally accepted; and the experience so gained brought about the national selective service of 1940 and its great expansion between 1941 and 1945 during the American participation in the Second World War. Shortly after this time there became apparent the necessity for a federal national army of men selected for compulsory service even in peacetime, and the draft so provided continues to the present day. The easy acceptance of this constitutional power in our time stands in curious contrast to the elaborate apologies, in the Federalist Papers of 1787–1788, for entrusting to the central government any power whatever to maintain a standing army. Hamilton wrote in the twenty-eighth Federalist Paper a defence of it founded on the possibility of internal military resistance by the States against any attempted federal usurpation of power.

> "It may safely be received as an axiom in our political system, that the State governments will, in all possible contingencies, afford complete security against invasions of the public liberty by the national authority. Projects of usurpation cannot be masked under pretences so likely to escape the penetration of select bodies of men, as of the people at large. The legislatures will have better means of information. They can discover the danger at a distance; and possessing all the organs of civil power and the confidence of the people, they can at once adopt a regular plan of opposition, in which they can combine all the resources of the community. They can readily communicate with each other in the different States, and unite their common forces for the protection of their common liberty.
>
> "The great extent of the country is a further security. We have already experienced its utility against the attacks of a foreign power. And it would have precisely the same effect against the enterprises of ambitious rulers in the national councils. If the federal army should be able to quell the resistance of one State, the distant States would have it in their power to make head with fresh forces. The advantages obtained in one place must be abandoned to subdue the opposition in others; and the moment the part which had been reduced to submission was left to itself, its efforts would be renewed, and its resistance revive.

> "We should recollect that the extent of the military force must, at all events, be regulated by the resources of the country. For a long time to come, it will not be possible to maintain a large army; and as the means of doing this increase, the population and natural strength of the community will proportionably increase. When will the time arrive that the federal government can raise and maintain an army capable of erecting a despotism over the great body of the people of an immense empire, who are in a situation, through the medium of their State governments, to take measures for their own defence, with all the celerity, regularity, and system of independent nations?"

One wonders what the founding fathers would have said in 1787 if they had foreseen that warfare in the mid-twentieth century would require today's immense machines of transport and combat, and would necessitate mobilisation of many more millions than made up the entire population of the nation in Hamilton's day, which in turn would make necessary a startlingly centralised direction of the nation's economy. In 1947, two years after the firing on the Second World War battle-fronts had stopped, the Congress of the United States was still engaging in the peculiarly local business of fixing rentals of real (rentable) property in areas considered important to national defence. The Supreme Court of the United States sustained this federal power in a 1948 opinion which asserted that the war power included power "to remedy the evils which have arisen from its rise and progress," and suggested that the preservation of the traditional division between national and state functions depended less on constitutional limitation than on legislative self-restraint.[2] Mr. Justice Douglas wrote for the court a suggestion that "the question whether the war power has been properly employed in cases such as this is open to judicial inquiry."

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[2] *Woods* v. *Miller Co.*, 333 U.S. 138 (1948).

> "We recognise the force of the argument that the effects of war under modern conditions may be felt in the economy for years and years, and that if the war power can be used in days of peace to treat all the wounds which war inflicts on our society, it may not only swallow up all other powers of Congress but largely obliterate the Ninth and the Tenth Amendments as well. There are no such implications in today's decision. We deal here with the consequences of a housing deficit greatly intensified during the period of hostilities by the war effort. Any power, of course, can be abused. But we cannot assume that Congress is not alert to its constitutional responsibilities. And the question whether the war power has been properly employed in cases such as this is open to judicial inquiry."

The late Mr. Justice Jackson, whose experience as Attorney-General in a time of military crisis had given him a full realisation of the imperative needs of war, still felt and expressed his feeling of the danger to the federal structure in the power in time of peace to mobilise the nation for war. He wrote in a concurring opinion:

> "Particularly when the war power is invoked to do things to the liberties of people, or to their property or economy that only indirectly affect conduct of the war and do not relate to the management of the war itself, the constitutional basis should be scrutinised with care.
>
> "I think we can hardly deny that the war power is as valid a ground for federal rent control now as it has been at any time. We still are technically in a state of war. I would not be willing to hold that war powers may be indefinitely prolonged merely by keeping legally alive a state of war that had in fact ended. I cannot accept the argument that war powers last as long as the effects and consequences of war for if so they are permanent—as permanent as the war debts."

Despite Mr. Justice Douglas' idea of judicial scrutiny of military necessity, no act of Congress has been held *ultra vires* the central government on the ground that under the guise of war powers it attempted legislation on subject-matter reserved to the States. Two notable recent judgments of the Supreme Court have concerned the war powers, but neither involved the distribution of power between State and nation. One in 1955 held that a former member of the United States Air Force could not after his discharge constitutionally be arrested by the military and returned to Korea to stand trial by court martial for an offence alleged to have been committed during his military service.[3] The other held in 1952 that the President of the United States has no constitutional power to seize the nation's steel-mills in aid of military production when the Congress has provided other and different procedures for such seizures.[4] Neither of these judgments involved a problem peculiar to federal unions. The limits of court-martial jurisdiction and the subordination of the executive to the legislative have both troubled the unitary state of Great Britain at various times.

The emergence of many military problems in modern American government demonstrates the presence of an acute national need which calls for federal and not State action. The power to wage war must be the power to wage war effectively,[5] in advance of and after the end of the shooting; and this cannot consist with plurality of government. The growing involvement in military matters of all features of modern nations seems both regrettable and unavoidable; it is an increasingly great exception to the discrete operation of a federal nation.

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[3] *U.S. ex.rel. Toth* v. *Quarles*, 350 U.S. 11 (1955).

[4] *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579 (1952).

[5] See this statement by Charles Evans Hughes, quoted by Chief Justice Stone in *Hirabayash* v. *U.S.*, 320 U.S. 81, 93, and again by Mr. Justice Frankfurter in *Korematsu* v. *U.S.*, 323 U.S. 214 (1944).

III

In the 1920's and 1930's the great preoccupation of students of American government was not with war but with the economics of peace. State regulation of economic troubles seemed clearly inadequate, as unanimity was a practical necessity. The economy was more and more close-knit; its regulation was impossible within the borders of any one State. New York State imposed a minimum price for the milk from a New York farmer's herd; Vermont had no such law and New York was flooded with Vermont milk. State customs duties on State frontiers had been forbidden from the beginning as clearly inconsistent with peaceful internal relations.[6] Obviously federal price regulation applying to New York and Vermont alike was the only solution; but was it within the grant of federal power to "regulate Commerce . . . among the several States?" Apparently not, under the then current views of what legislative areas were reserved to the States. The Supreme Court had held in 1918 that Congress could not forbid interstate transport of the product of child labour, as this was an indirect means of attempting to control child labour in the production of goods, and production was not interstate commerce.[7]

> "In interpreting the Constitution it must never be forgotten that the nation is made up of states, to which are intrusted the powers of local government. And to them and to the people the powers not expressly delegated to the national government are reserved. *Land County* v. *Oregon*, 7 Wall. 71, 76. The power of the states to regulate their purely internal affairs by such laws as seem wise to the local authority is inherent, and has never been surrendered to the general government . . .
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> "In our view the necessary effect of this act is, by

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[6] *Baldwin* v. *Seelig*, 294 U.S. 511 (1935).

[7] *Hammer* v. *Dagenhart*, 247 U.S. 251 (1918)—the "Child Labour Case."

> means of a prohibition against the movement in interstate commerce of ordinary commercial commodities, to regulate the hours of labour of children in factories and mines within the states,—a purely state authority. Thus the act in a two fold sense is repugnant to the Constitution. It not only transcends the authority delegated to Congress over commerce, but also exerts a power as to a purely local matter to which the federal authority does not extend. The far-reaching result of upholding the act cannot be more plainly indicated than by pointing out that if Congress can thus regulate matters intrusted to local authority by prohibition of the movement of commodities in interstate commerce, all freedom of commerce will be at an end, and the power of the states over local matters may be eliminated, and thus our system of government be practically destroyed.
>
> " For these reasons we hold that this law exceeds the constitutional authority of Congress."

The authority of this *Child Labour* case lasted only twenty-three years; it was expressly overruled in 1941.[8] After a series of decisions in the first six years of the 1930's holding intra-state merchandising, mining and agricultural production to be so local in their nature as to be outside the central authority,[9] the Supreme Court in 1937 swung to the opposite view, and in a series of judgments held production in a factory,[10] the sale of milk,[11] the marketing of coal,[12] and even the growing of crops for home-farm consumption,[13] to be within federal regulatory power, either because these activities came within the stream of national commerce or because though obviously local in themselves they so affected inter-state commerce that the Congress, exercising its power to protect what is national, could regulate what was local. In the farm-fed-wheat case, the court said, in 1942:

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[8] *U.S.* v. *Darby*, 312 U.S. 100 (1941).

[9] *Schechter Poultry Corp.* v. *U.S.*, 295 U.S. 495 (1935); *Carter* v. *Carter Coal Co.*, 298 U.S. 238 (1936); *U.S.* v. *Butler*, 297 U.S. 1 (1936).

[10] *National Labour Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937).

[11] *U.S.* v. *Rock Royal Co-operative* 307 U.S. 533 (1939); *U.S.* v. *Wrightwood Dairy Co.*, 315 U.S. 110 (1942).

[12] *Sunshine Anthracite Coal Co.* v. *Adkins*, 310 U.S. 381 (1940).

[13] *Wickard* v. *Filburn*, 317 U.S. 111 (1942).

> " . . . Once an economic measure of the reach of the power granted to Congress in the Commerce Clause is accepted, questions of federal power cannot be decided simply by finding the activity in question to be ' production ' nor can consideration of its economic effects be foreclosed by calling them ' indirect.' . . .
>
> " Whether the subject of the regulation in question was ' production,' ' consumption,' or ' marketing ' is, therefore, not material for purposes of deciding the question of federal power before us. That an activity is of local character may help in a doubtful case to determine whether Congress intended to reach it. The same consideration might help in determining whether in the absence of congressional action it would be permissible for the state to exert its power on the subject-matter, even though in so doing it to some degree affected interstate commerce. But even if appellee's activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce, and this irrespective of whether such effect is what might at some earlier time have been defined as ' direct ' or ' indirect.'
>
> " . . . This record leaves us in no doubt that Congress may properly have considered that wheat consumed on the farm where grown if wholly outside the scheme of regulation would have a substantial effect in defeating and obstructing its purpose to stimulate trade therein at increased prices. . ."

War, its preparation and its consequences, and the national economy in all its ramifications, are thus alike in that their various aspects are interrelated. One cannot mount an assault in Europe or Africa without affecting the iron-mines of Minnesota. One cannot regulate child-labour in Massachusetts without considering the relation to it of child-labour in Arkansas. Both require central direction. A little reluctantly, the man who prizes the theory of plural localism exemplified in the original American constitution comes to acknowledge that in these two areas the inescapable force of events calls for central omnicompetence.

IV

During the last twenty years, the accelerated centralisation of the functions of war and of economic control have understandably enough alarmed many Americans. Suspicion of a federal colossus bestriding the State world, a suspicion which many of the Federalist Papers were intended to allay, has not yet died. Indeed suspicion of government is a good thing, within limits; but a considerable number of Americans, seeing the extending of two great headings of governmental power, have begun to eye warily the other constitutional heads, fearing lest specious increases be attempted under the guise of innocent-sounding devices. One of these headings is the power of the federal government to make agreements with other nations.

When the federal constitution was drafted in 1787, a crying issue had been raised about the title to British-owned lands in the United States and about the collection of debts owed British creditors by American debtors.[14] These examples without more showed the necessity of central power over diplomatic relations. Not only would the several states differ in their views about the state confiscation of such lands and claims; but if a durable peace was to succeed the war of 1775–1783 it must not depend on bargaining with thirteen different contracting powers; and international agreements once arrived at had to prevail over local policy even when that had crystallised into local statute.

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[14] See *Martin* v. *Hunter's Lessee*, 1 Wheat. 304 (1816) and *Ware* v. *Hylton*, 3 Dall. 199 (1796).

These necessities of international agreement were formulated in clauses of the Constitution.

> " Article I, section 10: No State shall enter into any Treaty, Alliance, or Confederation; . . .
>
> " Article II, section 2: The President . . .
>
> " He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two-thirds of the Senators present concur; . . .
>
> " Article VI: . . . This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding. . . ."

This last clause, dealing with the supremacy of treaties over inconsistent state law, has always been a somewhat sore point. Men who under a Virginia statute of 1777 had paid to a Virginia sequestrator debts, owed to British creditors, found themselves obliged to pay over again, this time to the British creditors themselves, under a clause of the treaty of peace of 1783 which read: " It is agreed that Creditors on either side, shall meet with no lawful impediment to the Recovery of the full value in Sterling Money of all bona fide Debts heretofore contracted." [15] Under similar reciprocal treaty provisions state law concerning the inheritance of lands was overridden.[16] In 1922 a treaty with Canada concerning the protection of migratory wildfowl was held by the United States Supreme Court to authorise federal legislation regulating hunting within the states, previously said by lower federal courts to be *ultra vires* the national government.[17] Mr. Justice Holmes wrote in the court's opinion:

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[15] *Ware* v. *Hylton*, 3 Dall. 199 (1796). This is said to have happened to Thomas Jefferson, among others. See Dumas Malone, *Jefferson the Virginian*, 260 (1948).

[16] *Havenstein* v. *Lynham*, 100 U.S. 483 (1880).

[17] *Missouri* v. *Holland*, 252 U.S. 416 (1920).

> "It is obvious that there may be matters of the sharpest exigency for the national well-being that an act of Congress could not deal with, but that a treaty followed by such an act could, and it is not lightly to be assumed that, in matters requiring national action, 'a power which must belong to and somewhere reside in every civilised government' is not to be found. *Andrews* v. *Andrews*, 188 U.S. 14, 33. What was said in that case with regard to the powers of the states applies with equal force to the powers of the nation in cases where the states individually are incompetent to act. We are not yet discussing the particular case before us, but only are considering the validity of the test proposed. With regard to that, we may add that when we are dealing with words that also are a constituent act, like the Constitution of the United States, we must realise that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. It was enough for them to realise or to hope that they had created an organism; it has taken a century and has cost their successors much sweat and blood to prove that they created a nation. The case before us must be considered in the light of our whole experience, and not merely in that of what was said a hundred years ago."

Twenty years later the Supreme Court went further and held that an executive agreement, never submitted to the Senate and without that submission not authorised in express terms by the Constitution, still was within the constitutional powers of the national government, and was of sufficient force to change the law of New York as previously proclaimed by its State Supreme Court.[18] In some parts of the nation worry began to be felt at this new way to make national law overriding inconsistent law within the several states. An alarming spectre haunted fearsome imaginations—an idealistic President making a series of self-executing international agreements, approved by the bare required number of Senators, or perhaps never even submitted to the Senate at all, thus forcing on reluctant States a new code of law contrary to their wishes. This prospect was only slightly less fearsome for being imaginary. A series of proposed constitutional amendments were introduced in the House and Senate, limiting the power of the executive thus to extend the constitutional competence of the national government.[19] These were opposed, and in my judgment properly opposed, by the President. Executive agreements are essential for modern international relations. Such agreements, and full-scale treaties, must necessarily control many local relations. But in acknowledging this necessity, and in taking satisfaction in the failure of these limiting proposals thus far to pass, one must also acknowledge that here is another source of central power, which, added to the powers to make and prepare against war and to control the economy, still further reduces the ultimate redoubt of states' rights.

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[18] *U.S.* v. *Pink*, 315 U.S. 203 (1942).

V

From the earliest days of the Union, tension has arisen from the inconsistency between the ideal of equality in the inalienable right of all men to pursue happiness, and the institution of human slavery and its surviving consequences despite its abolition in 1865. To most of the United States, high emotional and ethical associations cling around the memories of William Lloyd Garrison, Harriet Beecher Stowe, John Brown and other dedicated abolitionists. Northern school-children in their early years are told of the idea of negro freedom and equality that inspired such men and women, that finally set Massachusetts and Vermont regiments marching south to the music of Julia Ward Howe's " Battle Hymn of the Republic." On the other hand the war of 1861–1865, like all wars, left deep scars among the defeated. A Union army of occupation had garrisoned the surrendered Confederate states, and northern officials, by enforcing Union laws, had advanced the negro's status in the midst of the states where lately he had been a slave who could not even hope for the constitutional possibility of citizenship. The feelings so generated in the South were not extinguished by the withdrawal of Union troops, and certain decisions of the federal courts gave scope to private expression of these feelings. In 1883 the Supreme Court held that the guarantees of equal protection and due process of law, made part of the Constitution by the post-war fourteenth Amendment, were guarantees against State-perpetrated wrong, but gave the United States no power to interfere when a private person or many private persons discriminated against a negro.[20] The way was thus clear for many oppressive practices with which the federal government could have no constitutional concern, though that government was actually in the control of the legislators from the more numerous northern states.

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[19] See A. E. Sutherland, "Restricting the Treaty Power," 65 Harv.L.Rev. 1305 (1952), and "The Bricker Amendment, Executive Agreements, and Imported Potatoes," 67 Harv.L.Rev. 281 (1953).

In 1896 the Supreme Court, deciding the famous case of *Plessy* v. *Ferguson*,[21] laid down the doctrine that a state might satisfy the constitutional requirement of equal treatment, despite compulsory segregation of the races, provided only any public facilities so afforded were equal for white and for negro.

This doctrine of " separate but equal," lasted fifty-eight years. During its troubled existence it offered a means of adjustment between the desire of certain states to arrange race-relations according to their own wishes; and the increasingly troubled conscience of the people of the nation. The facile logic of equality in compulsory separation permitted, for a while, many good men to reconcile themselves to a sorry custom by providing better though separated public advantages for a race that had risen from slavery. But the judgments of the Supreme Court in 1954[22] (holding that in public education neither nation nor state could constitutionally keep negro children apart from the rest), and in November, 1956[23] (holding invalid state laws requiring racial segregation in public transport)—were nevertheless both inevitable. Despite all the wars and cruelties which mar the days of this generation, as they have marred all history, the quality of compassion, of sympathy, is increasing among civilised men. Constitutional doctrine in the United States is not fixed rigidly for all time, holding the government in an unchanging framework of eighteenth-century concepts. Nor is it as volatile and evanescent as a justice of the Supreme Court once feared, in a moment of concern at an overruled case concerning the negro right to vote despite private pressure, when he wrote:

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[20] Civil Rights Cases, 109 U.S. 3 (1883).
[21] 163 U.S. 537 (1896).

> "The reason for my concern is that the instant decision overruling that announced about nine years ago, tends to bring adjudications of this tribunal into the same class as a restricted railroad ticket; good for this day and train only."[24]

No constitution can, or should, stop change completely. What is needed is a governmental institution providing an element of resistance to the most violent changes of direction in response to popular emotion, yet providing at the same time a means for gradual change in the fundamental law in response to gradual change in the fundamental ideas of the nation. And if there is to be a federal structure in which a large measure of local policy is left to be decided by each of the component states, there must be established a means of prescribing limits for the divergence of any state intolerably far from the political theory or the moral concepts of the majority of the nation. This function is precisely what is performed by the Supreme Court of the United States under the due process and equal protection clauses of the Fourteenth Amendment.

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[22] *Brown* v. *Board of Education*, 347 U.S. 483 (1954).

[23] *Gayle* v. *Browder*, 77 Sup.Ct. 145 (1956).

[24] Mr. Justice Roberts dissenting in *Smith* v. *Allwright*, 321 U.S. 649 (1947).

But, the question is inevitably asked, what if a state refuses to conform to such a declaration? The philosophical questions of theoretical sovereignty are beyond the plan of this paper, and escape the understanding of its author. But from time to time in the United States the problem of a recalcitrant minority of states has arisen and an answer has had to be found, not in the philosophy of the schools but in the hard realities of practical government. The lamentable war years of 1861–1865 provided a stern and necessary solution of the conflict between the extreme and opposing logics of secession and of compulsory union, but no man now wants any such armed conclusion, nor expects its need ever to arise again. Yet there are now in the American union eight states whose long-established customs are asserted by their officials, in sharp opposition to judgments of the nation's highest court. How shall this be settled?

The current racial controversy does not by any means present the first example in the history of the United States of a state strenuously objecting to a judgment of the Supreme Court. Between 1906 and 1920 the states of Virginia and West Virginia (the latter had been formed during the Civil War from the old state of Virginia) carried on in the Supreme Court an embittered litigation over the payment of West Virginia's fair share of the old Virginia's pre-war bonded debt. Virginia obtained a judgment against West Virginia for a number of millions of dollars: the difficulty came in compelling West Virginia to pay.

Mr. Justice Holmes, who had three times been wounded as a Union officer, wrote in 1911 in one of the series of opinions in this litigation[25]:

> " . . . this is no ordinary commercial suit, but . . . a quasi-international difference, referred to this court

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[25] *Virginia* v. *West Virginia*, 220 U.S. 1, 36 (1911).

> in reliance upon the honour and constitutional obligations of the states concerned. . . . Great states have a temper superior to that of private litigants, and it is to be hoped that enough has been decided for patriotism, the fraternity of the Union, and mutual consideration to bring it to an end."

And in 1918 while West Virginian continued to resist, Chief Justice White, one-time private in a Louisiana regiment in the Confederate Army, wrote for the Supreme Court:

> "Obviously, if it be conceded that no power obtains to enforce as against a state its duty under the Constitution in one respect and to prevent it from doing wrong to another state, it would follow that the same principle would have to be applied to wrongs done by other states, and thus the government under the Constitution would not be an indissoluble union of indestructible states but a government composed of states each having the potency with impunity to wrong or degrade another—a result which would inevitably lead to a destruction of the union between them. . . to disregard and overthrow the doctrines irrevocably settled by the great controversy of the Civil War, which in their ultimate aspect find their consecration in the Amendments to the Constitution which followed."[26]

Ultimately West Virginia complied.

In the last analysis states in a federal structure must act voluntarily if government is to proceed in a workable manner, though minorities within them can be compelled to conform, if constitutional power can be found in the central government. The School Cases show one more example of a change in constitutional relationship between states and nation, brought about by judicial action. A state school-board can be enjoined by a United States

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[26] *Virginia* v. *West Virginia*, 246 U.S. 565, 602–603 (1918).

District court—a court, as should be remembered, presided over by Presidentially appointed judges having no connection with state government, quite distinct from the State courts which may be sitting in the same city. And a federal court may enjoin individuals who seek to interfere with a complying school-board. The federal District court has contempt power to use over recalcitrant defendants. But if a large enough number of people resist a decree, enforcement by decrees of contempt becomes impracticable. Then the nation must rely on the considerations that Holmes suggested in the West Virginia case; on the conscience of the people, on the abiding Puritan tradition which had so much to do with the establishment of American political institutions; which has suffused the beliefs of all sorts and conditions of American men, men of all religious beliefs and of none; which is often forgotten by the hasty observer, but which, now and then, is deeply stirred and asserts itself. In the long run this conscience will bring compliance with the school decree and its successors in the field of transportation and other public activities. Here again, one acknowledges another diminution in state independence, brought about by an assertion of power by the central government, and again it is a change I approve. The moral rightness of it overcomes my reluctance to see a shrinking local autonomy.

VI

To decide the proper end of government is as difficult as to decide the true end of man; the two must after all be the same. But at any rate all men seem to have been born with some wish for freedom, itself an end hard to define but surely including an aspiration by the individual to control his own fate. And if the discerning man, remembering the age-long bewildering controversies over freedom of will, and remembering the practical constrictions inseparable from life in crowds, begins to fear that individual free choice may well be only an illusory hope, he probably at the same time comes to realise that even the illusions of freedom are well worth cherishing. It is an essential end of government that the governed shall at least feel free.

This feeling is closely associated with the smallness of the State. Perhaps the very smallness of the city-states in Greece, and of republican Rome, was one of the reasons for the interest that these held for eighteenth-century constitutionalists.[27] The greatness of Scotland has lain in its independence of thought, not in continental area or in multiple millions of population. A peculiar excellence of the state of Vermont is its intimacy. Its people can understand it, can feel a share in its public conduct; can feel an affection for their State as something of their own, instead of resentment at a monster that owns them. When philosophers of government suggest that the federal form has become obsolete, that the tight-knit economy of a modern nation can more effectively and efficiently be controlled from a unitary centre,[28] they seem to overlook this yearning of the individual to be concerned with a government which he can comprehend.

At once arises the suggestion that this worthy end can be accomplished perfectly well by a central government of unlimited powers if it will only exercise them with restraint, if it will allow to its prefectoral districts a reasonable measure of self-rule, asserting its central control only when true need comes. And indeed every federal nation has the means of unlimited central power. In the United States, constitutional amendment is a form of central legislation without bounds in legal effect, only rendered more difficult by a requirement of consents much more widespread than the usual legislative majorities. But in the United States this requirement of wide consent is just enough to give some sense of abiding independence to the states. Their survival does not depend on any momentary whim.

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[27] See for examples the Federalist Papers, *passim*.

[28] See Harold J. Laski, "The Obsolescence of Federalism," 98 *New Republic*, 367 (May 3, 1939).

Nevertheless the history of the federal union in my country suggests that central power tends to grow; and one asks whether this portends the substantial elimination of the independent governing powers of the several states; whether it suggests that before long they will become only geographical expressions, or administrative entities like counties in modern England. This is abundantly possible. It will only be delayed by tolerance of local difference, a quality hard to attain when the thing tolerated seems wicked or fatal to the majority, when tolerance seems indifference to evil, or to national disaster. The recent revision of constitutional doctrine concerning the status of the Negro in the American south, proclaimed by our Supreme Court, is a change I welcome; a change which after more than two generations finally gives what seems to me a correct effect to the constitutional amendments of 1865, 1868 and 1870. The court's decision was overdue. I would not have had it other than it was. But the change in direction gives pause; for in today's world when troubles arise in federal nations the remedy seems always to be less federalism and more central power, and this carries some disadvantages as the cost of its improvements.

Capability for local self-government; a sense of opportunity to participate in self-rule; small government fostered by constitutional guarantee; if these things have any value—and I am very sure they have immense value—a careful watch must be kept on their sacrifice, a careful account must be cast of every proposed change to show the cost of whatever we gain and lose. The preservation of whatsoever is good in a federal structure is not a simple matter, is not to be achieved by the passage of law or by a constitutional amendment. It depends on state and nation alike. It depends on reticence in the majority of states and in their people, which makes them hesitate to impose likeness on a minority of states unless difference is truly intolerable. It depends on wisdom and foresight in the minority of states and in their people, which leads them to adopt their own ameliorative measures promptly and generously, and so reduce the pressures for compulsory conformity. It depends, in the last analysis, on certain ancient and abiding virtues in men,—on self-restraint and self-respect; on tolerance of others, and on their being worthy of tolerance; on those decencies of life which make life itself tolerable. Perhaps, as Holmes once suggested,[29] our need is to be more civilised.

ARTHUR E. SUTHERLAND.

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[29] O. W. Holmes, Jr., "Law and the Court" (1913) in *Collected Legal Papers* (1920), p. 291, at p. 296.

THE INDEPENDENCE OF THE SCOTTISH JUDICIARY

JUDICIAL independence may be safeguarded in several ways. Setting aside the personal integrity of the judge based on his judicial oath, such safeguards include payment of salaries out of the consolidated fund, immunity from legal proceedings and appointment for life. The last safeguard is probably the most important; but, oddly enough, in Scotland that safeguard has no express statutory or other basis. Few of the books are helpful. Stair (who himself was superseded as a judge in 1681 [1]) is silent. Erskine states (without citing authority) that the judges hold their places *ad vitam aut culpam*.[2] The later books follow this and add (also without authority) that the judges do not demit office on the demise of the Crown and that they may be removed by resolutions of both Houses of Parliament.[3] However, elsewhere it is stated that the basis of the judges' *ad vitam* tenure is partly the Claim of Right and partly practice; and the opinion is also ventured that, although there is no statutory provision for removing Court of Session judges, the English procedure—resolutions of both Houses of Parliament [4]—would probably be applied.[5] The Claim of Right did not prescribe that the tenure of the judges should be *ad vitam*; it merely referred to the recent " changeing the nature of the Judges gifts *ad vitam* and *aut culpam* Into Commissions *durante beneplacito*." [6] In the absence of clear authority we are thrown back on practice.

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[1] Pitmedden, Abridgement of Books of Sederunt, National Library of Scotland Adv. MSS. (hereafter Pitm.), November 1, 1681; Brunton & Haig, *Senators of the College of Justice* (1849) (hereafter Brunton), 369.

[2] *Institute*, i, 2.32.

[3] Mackay, *Practice* (1877), i, 94; *Manual* (1893), 16; Maclaren, *Practice* (1916), 7.

[4] Supreme Court of Judicature (Consolidation) Act, 1925 (15 & 16 Geo. 5, c. 49).

[5] Fraser, *Constitutional Law* (2nd ed.), 206, quoting *McCreadie* v. *Thomson*, 1907 S.C. 1176, *per* Lord Justice-Clerk (Macdonald) at 1182, 15 S.L.T. 216.

[6] *Acts of Parliaments of Scotland* (Record Edition) (hereafter *A.P.S.*), ix. 39. The Claim of Right was later ratified, and it was declared to be treason to speak against it or deny it: 1703, c. 3, *A.P.S.*, xi. 104.

Before 1626

In the rather perfunctory legislation by which the College of Justice was instituted the first judges were chosen by the King with the advice and consent of the Three Estates.[7] Subsequent appointments were made by the King, either alone or with the consent of Parliament. There was nothing in the original institution about the nature of the judges' tenure or the manner of their removal, other than a promise by the King to investigate and punish wrongdoing by a senator.[7a] (None of this, of course, applied to the Chancellor and the " extraordinary lords," who were undeniably removable at the will of the King.[8])

As regards the fifteen ordinary lords, everything—especially before 1626—points to a life tenure. Judicial office in Scotland tended to be granted for life, and was frequently, or often became, hereditary. This was the case with the office of Justice-General, the Admiral and the sheriffs. In the Supreme Court such tendencies were reinforced by the quasi-collegiate form which the court took: new judges were not appointed by the King under a commission as in England: they were presented by a letter under the signet,[9] subscribed [10] by the King, and they were admitted to their places by the Chancellor, President and other Lords of Session.[11] The lords could, and did, reject unsuitable nominees.[12] These letters of presentation did not, except in two or three cases,[13] specify any tenure. Sometimes, after 1581,[14] the King nominated a leet [15]; but in such cases the court usually admitted the nominee preferred by the King.[16] Occasionally the King himself was present when more questionable promotions were being made.[17] Once a judge was admitted, it was the court, not the King, which granted the judge leave of absence—although often in response to a royal request.[18]

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[7] 1532, c. 2, *A.P.S.*, ii. 335.

[7a] *Acts of Lords of Council in Public Affairs*, 378.

[8] Hannay, *College of Justice*, 114; Brunton, xxxiii, xlvii.

[9] Later under the great seal: Pitm., November 1, 1681.

[10] Superscribed (sometimes the cachet) after James VI went to England: Miscellaneous Session Papers, Register House, D. 1.b. *passim.*

[11] Hope, *Major Practicks*, v. 4.75; admission of James Meldrum of Seggie, July 8, 1575: Miscellaneous Session Papers D. 1.b.3.; 10 Geo. 1, c. 19.

[12] 1540, c. 10, *A.P.S.*, ii. 371; 1579, c. 37, *A.P.S.*, iii. 152; Hannay, *College of Justice*, 112.

[13] Pitm. i. 425 (June 28, 1608); i. 431 (January 16, 1611).

[14] Books of Sederunt, iv. 118.

[15] Pitm. i. 362, 432, 245; " Manner of Holding Judicatores," *S.H.R.*, xix (1922), 269; admission of Thirlstane, Books of Sederunt, April 24, 1581; Brunton 142; Hannay, *op. cit.*, 112.

There had been appropriated to the court certain revenues drawn from the larger benefices of the Church[19]; this source (which continued long after the Reformation) was supplemented by other income (such as a part of the quots, or dues, of testaments[20]), and the whole revenues were administered not by the Crown but by Collectors of the Court.[21] Granted that a judge had attended the court at all, he had an indefeasible right to a *per diem* share in these revenues. All this merely illustrates the independence of the senators of the College of Justice from the Crown, an independence which was reinforced by the growth of an *esprit de corps*.

More particularly, the position of the extraordinary lords, who were both unpaid and removable at will, seems by contrast to suggest a permanent status on their (paid) ordinary brethren. Such a suggestion is strengthened by the frequent practice of demission *in favorem* made by the senators.[22] Although the effect of this practice on the administration of justice was cause for criticism[23] by the more highminded statesmen such as Seton,[24] and was the subject of legislation,[25] it was never attacked on the ground that because a judge had merely a transitory interest in his place, therefore he had no valuable right to assign. Indeed, it was the King as a party to these transactions who bore the brunt of Seton's criticisms.[26]

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[16] Hannay, *op. cit.*, 113.

[17] *Ibid.*, 119.

[18] *e.g.*, Rector of Eskirk in 1539: *Acts of Sederunt* (1811), 39.

[19] Hannay, *op. cit.*, 43 *et seq.*

[20] Balfour *Practicks* (1751) 673; *Acts of Sederunt* (1790) (March 1, 1563), 5; Pitm. i. 356.

[21] Hannay, *op. cit.*, 76; *Acts of Lords of Council in Public Affairs*, 565, 632; Books of Sederunt, iii. f. 277.

[22] *Analecta Scotica*, ii. 347, 349; Miscellaneous Session Papers, D. 1.b.3; Pitm., i. 312.

[23] Hannay, *op. cit.*, 118.

[24] Seton to James VI, May 30, 1603. *Letters & Papers of James VI* (Abbotsford Club) 56.

[25] Pitm., i. 333, 415; Books of Sederunt, iv. f. 125.

Although a rather tainted testimony and far from conclusive, it is an element in favour of an *ad vitam* tenure that the judges themselves believed they had life grants. The demissions *in favorem* show this. In 1626, Lord Chancellor Hay denied that the judges' places were *ad beneplacitum*.[27] Lords Lauderdale and Carnegie went so far as to say that they had "as good a right to their places as to their lands." [28] (In view of Charles I's designs on these lands, the simile may not have been as apt as the noble judges had intended.) Melrose, the former Lord President, went to great lengths and with great force argued that the judges had a life tenure:

> "Places during lyfe requyre not the warrand of the King's great Seal but are lawfullie possessed according to the conswetude of the realme quhilk is in place and force of law quhen no law is made to the contrair." [29]

Melrose did qualify his assertions by admitting that there were just grounds for removal, "*ob culpam*," "diverse crimes," "inhabilitie." [30] In so far as the extant records show, these views of the judges are borne out.

Removal of bad judges was an obvious limitation to security of tenure and this limitation had found general acceptance in Scotland: judges were to be removed for ever; hereditary judges for a term of years.[31] The broad grounds for removing a judge of the Supreme Court were either prolonged absence or some fault. For a time persistent absence could be visited with deprivation, but in 1578 the penalty was restricted to a loss of salary.[32] Non-attendance seems to have been common in the early years of the Court of Session, largely because the expected revenues (and salaries) were not forthcoming.[33] In such cases, where there were " diverse dede, sume seke and sum away," " something vaik," " not sufficient number to decide causes," [34] new promotions were made.

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[26] Hannay, *op. cit.*, 121.

[27] Sir John Scot of Scotstarvet, "Trew Relation," *S.H.R.*, xi (1914), 172; *Mar & Kellie Papers* (Hist. MSS. Comm.), i. 143.

[28] "Trew Relation," 169.

[29] *Ibid.*, 176.

[30] *Ibid.*, 174–175.

[31] 1318, c. 22, *A.P.S.*, i. 472; 1384, *ibid.* i. 155a; 1457, c. 23, *ibid.*, ii. 50; 49b; 111b, 207b; 1540, c. 14, *ibid.*, ii. 372.

[32] Pitm. i. 181; Hope, *Major Practicks*, v. 4.66.

The number of deprivations for sins of commission was not large. Some judges, such as Archibald Douglas [35] and Maitland of Thirlstane,[36] were removed after forfeiture or conviction for treason; although in the case of Lord President Balmerino the quality of the treason was somewhat artificial.[37] The places of others, such as Bishop of Ross, were filled after their flight.[38] Robert Pont, Provost of Trinity, who was the only Reformed clergyman on the bench, was forced to give up his place in terms of the Act of 1584 which disqualified beneficed ministers from holding judicial office.[39] (The uncompromising attitude of the Kirk towards the combination of clerical and judicial office [40] prevented the Reformed clergy from assuming the position on the bench of the pre-Reformation spiritual estate, an estate which was fast being depleted.)

Some judges were removed for " inhabilitie ": among these were the Dean of Aberdeen [41] and Archibald Crawford.[42] Inhability was a term of art inferring unfitness, incapacity or disability for office, for reasons of nonage or lack of qualification [43] and was contrasted with turpitude—" diverse offences quhilk merit his deprivatioun." [44]

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[33] Hannay, *op. cit.*, 68, 81.

[34] *Acts of Lords of Council in Public Affairs*, 389; *Acts of Sederunt* (1811), 23; Pitm. i. 67 (July 4, 1547).

[35] " Now incapable of that trust ": Pitm. i. 234–235; Brunton 127; appointed June 2, 1568, Pitm. i. 181; removed before March 25, 1572, Court of Session Pecuniary Affairs; restored November 11, 1578, Books of Sederunt; Pitm. i. 215; forfeited November 28, 1581, *A.P.S.*, iii. 196.

[36] Brunton, 141.

[37] Pitm. i. 422, 425; Brunton, 209.

[38] Pitm. i. 181; Brunton, 177.

[39] 1584, c. 6, *A.P.S.*, iii. 294; Pitm. i. 259.

[40] *Book of Universall Kirk* (Bannatyne Club) ii. 425.

[41] Brunton, 123; Books of Sederunt, January, 1576.

[42] Pitm. i. 181; Brunton 137.

[43] Jamieson, *Dictionary* (1880), *s.v.*; *Oxford English Dictionary* (1933), *s.v.*; nonage of King: 1567c *A.P.S.*, c. 1, ii. 11; lack of Irish tongue in a Highland minister: Keith, *History*, 528; *cf.* 1488, c. 14, *A.P.S.*, ii, 209; Balfour, *Practicks*, 22.

[44] Pitm. i. 181; " Trew Relation," 175.

In the 1580s and 1590s English observers report impending removals of Lords of Session,[45] but either these did not in fact take place or the reports arose out of the confusion in an alien mind of the differences between extraordinary and ordinary lords, or between Lords of Council and Lords of Session.

It appears, then, that in these years the removal of judges was resorted to infrequently and then only on very limited grounds involving absence, turpitude or inhability.

Perhaps the most significant reason for regarding the judges' tenure as *ad vitam* is the attitude of the Crown. It was only the Crown which could have any title or interest to assert an *ad beneplacitum* tenure: yet the Crown seemed to bend over backwards to avoid acting on such an assertion. A few examples illustrate this forbearance on the part of the Crown. During the civil strife of James VI's early minority, many of the Marian faction were forfeited in 1571.[46] Among these were three judges of the Court of Session including the Lord President, the infamous Sir James Balfour of Pittendreich. Balfour had absented himself from the court before 1571; yet the name of this enemy of the State was retained on the account sheets until 1574, although with the word "*nichil*" against his name, and the name of an "understudy," Alexander Colvil, bracketed with that of Balfour.[47] Another of the Marians, Archibald Douglas, Parson of Glasgow, resumed his place after seven years' absence.[48] The most extreme example of restoration of a duly admitted judge is that of David Chalmers of Ormond. Chalmers had been forfeited in 1568 for his part in the murder of Darnley and the escape of Mary from Lochleven.[49] The vacancy created by his flight was filled by the Abbot of Dunfermline.[50]

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[45] *Calendar of Scottish Papers*, v. 581; x. 306, 325, 330.

[46] *Register of Privy Council* (hereafter *R.P.C.*) ii. 114; Calderwood, *History* (Woodrow Society), iii. 137; Spotswood, *History* (Spotswood Society), ii. 163.

[47] *Notes & Queries* (1958) New Series, Vol. V, pp. 6–8.

[48] *Ibid.*; Books of Sederunt, November 11, 1578; Pitm. i. 215.

[49] *A.P.S.*, iii. 54.

[50] Pitm. i. 181.

Ten years later Chalmers was restored: during these ten years, Dunfermline had died and had been succeeded by the Dean of Dunkeld[51] who had to make way for the returning absentee.[52]

In the more settled years of James' later reign, the King on one occasion tried and failed to dismiss a judge. In January, 1598–99, the court had excused one of their number, Sir Thomas Lyon of Balduckie, from attendance on the ground of ill-health.[53] A few months later the King wrote to his Advocate, Sir Thomas Hamilton (later Earl of Melrose), asking him to prepare a " summons for his deprivation " on the ground of his prolonged absence from the court and because he remained unrelaxed at the horn[54]—but to no purpose, for Balduckie's place was not filled until after his death in 1608.[55] This unwonted action on the part of the Crown probably arose from the fact that Balduckie had been Treasurer, at least until 1596.[56] The Treasurer or his Depute normally had a place on the Bench and the absence of Balduckie did not create a vacancy for the King's new financial representative on the Bench.

Charles I

The attitude of the Scottish Crown towards the Bench is in striking contrast to the situation which obtained in England. There the judges were very much lions *under* the throne, especially after the dismissal of Coke. One reason for this was that the relative weakness of the Scottish Crown had allowed the court to arrogate a position of independence not usual among the royal servants of the Renaissance monarchies. A more fundamental reason lay in the respective strengths of the Scottish and English parliaments. In Scotland the King had little need to pack the Bench or to overawe the judges[57] or to resort to judicial legislation in favour of the royal prerogative, because most of the royal wishes could be forced through the Estates or enacted by the Privy Council. In England, on the other hand, the determined resistance of the House of Commons to the Stuart monarchy (backed by control of the purse) forced James and Charles to look to a subservient judiciary to carry out their policies. However, with the accession of Charles I, the state of affairs in Scotland underwent a change.

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[51] *Ibid.* i. 264.
[52] *Ibid.* i. 277; Brunton, 123, 197.
[53] Brunton, 205; Books of Sederunt, January 30, 1598.
[54] *Melrose Papers* (Abbotsford Club), i. 1, Treasurers Accounts May 1599 f., 48.
[55] Pitm. i. 423; Brunton, 205, 247. Books of Sederunt, February 18, 1608.
[56] Brunton 205.

Charles had in mind great alterations in Church and State[58]; and it was likely that these would meet with much opposition especially from those (particularly holders of Church lands) affected by the Revocation of 1625. Since the Court of Session had privative jurisdiction in matters of fee and heritage it was necessary for Charles to ensure that the court cease to be dominated by the great landowners. Charles had independent plans for reforming the Scottish administration which also affected the court. Broadly, Charles' proposals for the court were—

(1) to remove from the Bench all judges who were nobles, officers of State or Privy Councillors; and
(2) to have the judges admit
    (i) that their places fell vacant by demise of the Crown[59]; and
    (ii) that their tenure was *ad beneplacitum*, not *ad vitam.*[60]

Charles justified these proposals with the plea that he was thereby restoring the court to its original institution.[61]

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[57] The case of Bruce, in which James VI received a rebuff at the hands of Seton, was exceptional and was not of great constitutional significance because no royal right was being adjudicated: Lord Cooper, "King *versus* Court of Session," *Selected Papers*, 116. Letters by the Kings—even Charles I—to the court generally dealt with private rights of suitors who were pestering the King or with administrative matters: Earl of Stirling, *Register of Royal Letters* (hereafter *Register*) *passim*.

[58] *R.P.C.* (Second Series) i., preface *et passim*.

[59] James VI had died on March 27, 1625: Dunbar, *Scottish Kings*, 272.

[60] *Register*, i. 12 *et passim*; *R.P.C.*, i. preface *et passim*; *Mar & Kellie Papers*, i., ii. *passim*; "Trew Relation," 168 *et seq.*; Miscellaneous Session Papers, *passim*.

[61] "Trew Relation," 168. *Register*, i. 12.

In point of fact, the proposals (except with regard to the nobles[62]) were quite unhistorical: the defects (if such they were) which Charles proposed to remedy were congenital. Privy Councillors and Officers of State had always been on the Bench, occasionally to the extent of one half. Lapse of " commissions " on demise of the Crown had never been observed in the past, and indeed was not to be observed in the future (although oaths of office were reaffirmed from time to time). In 1760 Parliament deemed it unnecessary to extend to Scotland the Act abolishing the rule with regard to the English judiciary.[63] And, as we have seen, actual practice was against the idea of an *ad beneplacitum* tenure.

In order to overcome the strenuous opposition to these innovations which appeared in the Estates,[64] in the Council[65] and among the judges[66]—an opposition which was more national than that of selfish nobility defending its privileges—Charles summoned the leading men of Scotland to a conference at Whitehall.[67] At the meetings there the King was aided by a number of Scottish bishops and *parvenu* laymen without experience of the Scottish administration who were willing to support the prerogative in order to curb the exorbitant power of the nobility[68] and fish in the troubled waters created by Charles' alterations.[69] Their spokesman was Scotstarvet; that of the delegation from Scotland, the Earl of Melrose.[70] The present importance of these discussions is that, after having searched the records, each side set out their respective contentions on the nature of the judges tenure.[71] Those of Melrose were more cogent and consistent with actual practice; those of Scotstarvet were largely arguments from silence. Not unnaturally, Charles adopted the views which he wanted to hear, and proceeded with his original plans. Early in 1626 new letters of presentation went out with a commission to the Vice-Chancellor, Winton, to see them executed.[72] A few days later Winton was able to announce the successful conclusion of the matter.[73]

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[62] The presence of the nobles among the ordinary lords had been a recent development largely brought about by the ennoblement of existing judges. Earlier, Robert, Lord Boyd appeared as an ordinary lord from 1571 to 1573: Court of Session Pecuniary Affairs. He was *later* an extraordinary lord: Brunton, 155.

[63] 1 Geo. 3, c. 23.

[64] Burnet, *History of My Own Time* (1838), 11; *R.P.C.*, i. xliv., 173, 178–179; Row, *History* (Woodrow Society), 341; *Mar. & Kellie Papers*, ii., 238; " Trew Relation," 168, 169).

[65] *R.P.C.*, i. 183–185, 193.

[66] " Trew Relation," 168 *et passim*; Miscellaneous Session Papers, D. 1.7; *Mar & Kellie Papers*, i. 141, 143.

[67] *R.P.C.*, i. 209.

[68] " Trew Relation," 191.

[69] *Mar & Kellie Papers*, i. 140.

[70] *Ibid.*, i. 143.

However, on closer examination it appears that Charles' victory was neither decisive nor permanent. In the future, nobles and officers of State—including the Justice-Clerk—reappeared on the Bench. The whole of the change was effected by prerogative action which never received statutory confirmation. The recantations and submissions of those judges who were retained were authorised to be *entered* in the Books of Sederunt[74]; a few months later Charles ordered that his assertions about the judges' tenure should be *enacted* in the Books of Sederunt[75]; but if this was in fact done,[76] its legislative effect is not certain. Further, those judges who did leave the Bench were not dismissed: they resigned.[77] Undoubtedly they did so under pressure: the King threatened them with dismissal from their political offices,[78] thus facing them with the loss of a substantial official salary if they insisted on retaining an ill-paid judgeship. Further those judges who were reappointed *conceded*, for themselves alone, that their places were vacant on demise of the Crown and were disposable by the King; but they went on to protest that this concession was to be held as " not given " if they were not retained on the Bench.[79] Finally, in the new letters of presentation of both the retained and the new judges, there was no mention of the nature of their tenure.[80] They were in the same style as previously; and despite all these upheavals the judges continued to enjoy a *de facto* life tenure.

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[71] *Ibid.*, i. 137.

[72] *Register*, i. 14–16.

[73] *R.P.C.*, i. 234–236; Miscellaneous Session Papers D. 1.7.

[74] Miscellaneous Session Papers D. 1.b.7.

[75] *Register*, i. 46.

[76] The Books of Sederunt for this period are missing.

[77] Miscellaneous Session Papers D. 1.b.7.

[78] *Register*, i. 13; *R.P.C.*, i. 237.

After Charles I

In the half century before the Revolution the status of the judges underwent radical and frequent alteration depending on the relative power of the King and the Estates. The first statutory provision came during the supremacy of the Covenant. By the Act, 1641, c. 21, a new Bench was appointed by the King with the advice and consent of the Estates; and the tenure was declared to be *ad vitam vel culpam* [81] although this was not specified in the subsequent letters of presentation.[82] Charles had no option but to comply with the advice of the Estates and four of his judges failed to be reappointed.[83] In 1649 some of these parliamentary judges were themselves removed by virtue of the Act of Classes [84] which imposed on all public officers a test of religious and political orthodoxy. In 1652 after the Cromwellian conquest, the Court of Session was swept away and replaced by the Commissioners for the Administration of Justice to the People of Scotland. The former Lords of Session tried to extract an assurance of security of tenure as a condition of serving as commissioners.[85]

On the Restoration of Charles II—in which Scotland was far more royalist than England—the legislation of twenty years or more was swept away. The Cromwellian régime was treated as a usurpation (saving, however, in certain circumstances, the decrees of the Commissioners [86]); the legislation of the Estates since 1640 was rescinded [87]; and in ecclesiastical matters there was a return to the *status quo ante* 1633.[88] The appointment of the judges was expressly declared to be part of the royal prerogative; and there was a return to the order of 1637.[89] But once again the nature of the judges' tenure was omitted. The new Bench "nominated and appointed" by the King included some of his father's judges and some Cromwellian Commissioners such as Stair.[90] This royal appointment did not set a precedent as regards tenure: it arose from the "totall vacancie" which prevented the normal procedure of admission of presentees. A similar situation arose at the Revolution and was dealt with in the same way.[91]

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[79] Miscellaneous Session Papers D. 1.b.7.

[80] *Register*, i. 15; Hannay, *op. cit.*, 127.

[81] 1641, c. 21, *A.P.S.*, v. 354. Following on Charles' promise in the " Large Treaty " of 1640–41: *A.P.S.*, v. 340–44; Hailes *Letters* 124 *et seq.*

[82] Books of Sederunt, v. 141.

[83] 1641, c. 72, *A.P.S.*, v. 389.

[84] 1649, c. 30, *A.P.S.*, vi. (ii). 143.

[85] A. R. G. McMillan, " Judicial System of the Commonwealth in Scotland " (1937) 49 J.R. 232.

Subsequent elevations in the reign followed the traditional procedure but in the welter of royalism and oppressive government the letters of presentation contained a novel formula "requiring yow effectually to try receave and admitt him to the forsaid ordinarie place *during his life time.*" [92] But as might be expected a form of words was little defence to the absolutist policies of the restored Stuarts.

From 1661 to 1689 some nine judges left the bench involuntarily.[93] One resigned to escape impeachment [94]; another was deprived for malversation of office [95]; three were omitted from the new bench of 1681 [96]; Mackenzie of Tarbet was removed as the result of a political intrigue [97];

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[86] 1661, c. 87, *A.P.S.*, vii. 62.

[87] 1661, c. 18, *A.P.S.*, vii. 16; 1661, c. 126, *ibid.*, vii. 86.

[88] 1661, c. 6, *A.P.S.*, vii. 10.

[89] 1661, c. 62, *A.P.S.*, vii. 44.

[90] *A.P.S.*, vii. 124.

[91] *A.P.S.*, ix. Supplement, 136.

[92] Books of Sederunt, vi. 150 (1665), 310 (1670). Pitm., ii. 92.

[93] Sir George Mackenzie of Tarbet, Sir Andrew Ramsay of Abbotshall, Sir James Dalrymple of Stair, Sir Thomas Murray of Glendook, Sir John Baird of Newbyth, Charles Maitland of Halton, Sir Alexander Seton of Pitmedden, Sir Roger Hogg of Harcarse, John Wauchope of Edmonstone.

[94] Mackenzie, *Memoirs*, 250; Brunton 400.

[95] Pitm., ii. November 14, 21, 1682; Brunton, 397–398.

[96] *Ibid.*, ii. November 1, 1681; Brunton, 369.

[97] *Ibid.*, ii. 92; Brunton, 357.

and three were summarily removed for opposing the policies of James VII.[98] In 1681 and in 1687 new commissions in Latin and under the Great Seal were issued. In his *Abridgement*, Pitmedden remarks that the commission of 1681 was an unheard-of thing except during the Commonwealth.[99] This new commission corresponds with the general policy of the Government, after its victory over the Exclusion agitation, of calling in and modifying royal charters of burghs and universities and other corporations. The commission of 1687 is followed in the court records with the royal proclamation of the absolute dispensing power.[1] It was against these innovations that the Claim of Right was directed; and the Claim is only intelligible if it is assumed that *ad vitam* tenures were the rule, a rule which James VII had illegally broken and thereby forfeited the allegiance of his subjects.

A new Bench was appointed by William II himself because of the total vacancy,[2] but henceforth no judge was again superseded.

Subsequent legislation dealt with several matters affecting the judges—salaries,[3] qualifications,[4] abolition of extraordinary lordships,[5] exclusion of senators from the House of Commons[6]; but there was no legislation dealing with tenure or removal. In England, the Act of Settlement[7] gave the judges security of tenure and provided for their removal by resolutions of both Houses of Parliament. This, of course, is a pre-Union statute and thus does not extend to Scotland. These provisions were re-enacted in the Supreme Court of Judicature Act, 1925,[8] which deals only with the

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[98] *Ibid.*, ii. February 29, 1688; Brunton, 406, 407, 415.

[99] *Ibid.*, ii. November 1, 1681.

[1] *Ibid.*, ii. February 11, 1687.

[2] *A.P.S.*, ix. Supplement 136; Mackay, *Memoir of Sir James Dalrymple*, 228 *et seq.*

[3] 32 Geo. 2, c. 35, to Judges' Remuneration Act, 1954, 2 & 3 Eliz. 2, c. 27.

[4] 1707, c. 19, *A.P.S.*, xi. 411; 10 Geo. 1, c. 19, s. 1, *etc.*

[5] 10 Geo. 1, c. 19, s. 2.

[6] 7 Geo. 2, c. 16.

[7] 12 & 13 Wm. 3, c. 2.

[8] 15 & 16 Geo. 5, c. 49, s. 12 (1).

English judiciary.[9] The post-Revolution letters of presentation omitted [10] (and still do omit [11]) the words " during his life time " which had appeared first in Charles II's reign; and the appointment of the Lord Justice-Clerk, possibly because he was an officer of State, was expressly *durante beneplacito*.[12]

To sum up, the situation during the years 1641 to 1689 was clearly exceptional from which no valid conclusions can be drawn: setting aside this half century of turmoil and revolution, we have nearly four hundred years during which there appears to be not only the complete absence of a satisfactorily vouched case of arbitrary dismissal of a judge, but also the presence of a practice of life tenures which is attested by the actings and views of the Crown and the judges. Such legislation as touches on the matter—the Claim of Right—is only consistent with a tenure *ad vitam aut culpam*.

PETER G. B. MCNEILL

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[9] There are provisions for removal of sheriffs in Sheriff Courts (Scotland) Act, 1907, s. 13.

[10] *e.g.*, Books of Sederunt, v. 141.

[11] *e.g.*, Appointment of Lord Wark.

[12] Hannay, " Office of Justice Clerk " (1935) 47 J.R. 311.

LORD BROUGHAM'S ACT AND SCOTTISH IRREGULAR MARRIAGES

LORD Brougham's " Act for Amending the Law of Marriage in Scotland," 1856 (19 & 20 Vict. c. 96), was passed with the principal object of putting an end to the scandal of runaway marriages at Gretna contracted in accordance with the Scots law of irregular marriage. Section 1 of the Act prescribed that after October 31, 1856, " No irregular marriage contracted in Scotland by declaration, acknowledgment or ceremony, shall be valid unless one of the parties had at the date thereof his or her usual place of residence there, or had lived in Scotland for twenty-one days next preceding such marriage, any law, custom or usage to the contrary notwithstanding."

That the Act has not been fruitful of litigation[1] is perhaps a tribute to its efficacy, or more probably reflects the rarity of irregular marriage both before and after the Act; but it also leaves unresolved some important questions which, though the Act was repealed by the Marriage (Scotland) Act, 1939 (2 & 3 Geo. 6, c. 34), are still liable to arise in respect of irregular marriages contracted before July 1, 1940, when marriage by declaration *de praesenti* and by promise *subsequente copula* became invalid. Marriage by cohabitation with habit and repute can still be constituted in Scotland.

The obscurities arising from Lord Brougham's Act concern chiefly the categories of irregular marriage to which it is meant to apply. The classification of irregular marriages into those contracted by " declaration," " acknowledgment " or " ceremony " is not one which occurs in any of the works of authority. The traditional classification of Scots irregular marriages is: (1) by declaration *de praesenti*; (2) by promise of marriage on the faith of which the woman allows *copula*; and (3) by the interchange of consent to be inferred from proof of cohabitation and habit and repute.[2]

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[1] The only reported cases appear to be *Lawford* v. *Davies* (1878) 4 P.D. 61; *Drew* v. *Drew* [1912] P. 175; *Pepper (otherwise Barrington)* v. *Pepper*, *The Times*, Nov. 14, 1921; *Winterbottom* v. *Winterbottom* (1922) 38 T.L.R. 813; *Bach* v. *Bach* (1927) 43 T.L.R. 493; *Miller* v. *Deakin*, 1912, 1 S.L.T. 253 (O.H.); *Gray* v. *Gray*, 1941 S.C. 461, S.L.T. 361; *Cooke* v. *Taylor* (*ibid.*); *Fitzwilliam* v. *Att.-Gen.*, *The Times*, March 15, 1951.

It seems fairly clear that " declaration " in the Act refers to the usual form of irregular marriage by *sponsalia de praesenti* which has been accepted in Scotland as constituting *verum matrimonium*[3] and given statutory recognition (in one of its forms) in section 2 of the Act: *i.e.*, declaration by the parties before witnesses that they " accepted " of each other as husband and wife and " declared " themselves married persons.

If the meaning of " declaration " in the Act is clear enough, the meaning of " acknowledgment " is less so. Marriage by *sponsalia de praesenti* could be constituted by a declaration in the form " I take you, N., for my wife," or by an acknowledgment in the form " This is my wife," provided that in either case the woman signified consent, and that the consent was to present, not future, marriage. The declaration of marriage before two witnesses which was required by section 2 of the Act—the marriage could still be valid without complying with section 2—often took the form, " We accept and acknowledge each other," instead of " We accept . . . and declare. . . ." Thus the generally acceptable interpretation of " acknowledge " in the Act would appear to be that it is merely an alternative method of constituting a marriage coming within the category of marriage by *sponsalia de praesenti.* I shall have reason to return to this later and inquire whether a wider meaning was intended or is possible.

Meanwhile, it must be asked what is covered by the last of the three categories of irregular marriage to which the Act is to apply: those contracted by " ceremony." The term " ceremony " has no application to any of the three recognised forms of irregular marriage in Scotland, and outside the category of regular marriage (*in facie ecclesiae* or, after 1939, before a Registrar) it can only be assumed to refer to clandestine marriage, by which is meant a marriage celebrated by a layman assuming the character of a clergyman, or by a clergyman without banns or certificate of notice.[4] Celebration of or participation in such a ceremony formerly incurred penalties, though the marriage remained valid; and there gradually evolved a method of proving an irregular marriage by obtaining an extract of a conviction on a somewhat fictitious complaint that the parties had gone through a clandestine marriage ceremony. But strictly speaking, participation in an irregular (as distinct from a clandestine) marriage was no offence.

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[2] Walton, 3rd edition, p. 24; or see Stair's classification in i, 4, 6, *infra*.

[3] *Dalrymple* v. *Dalrymple* (1814) 2 Haggs.C.R. 54; *Macadam* v. *Walker* (1813) 1 Dow. 148.

The view that this is what was meant by "ceremony" in section 1 of the Act is supported by section 3, which enacts that no such extract of a conviction shall be given as evidence of an irregular marriage unless the residential qualifications of section 1 have been complied with. This out-of-date and illogical procedure for proving an irregular marriage was abolished by the Marriage (Scotland) Act, 1916.[5]

It can be seen that the classification of marriages to which section 1 of Lord Brougham's Act applies is apparently neither exhaustive nor exclusive as regards Scots irregular marriage.

This gives rise to certain difficulties. In particular, does the Act apply to marriage by promise *subsequente copula*? Prior to July 1, 1940, if a woman, on the faith of a promise of marriage, allowed a man to have sexual intercourse with her, marriage was constituted from the date of the *copula*. It is the *copula*, albeit on the faith of the promise, which constitutes the marriage.[6] None of Lord Brougham's categories seems to cover this: neither the *copula* nor the promise, nor both together, could be called a "declaration," or a "ceremony," or even an "acknowledgment," since this implies the recognition of an existing state of affairs, and the consent to intercourse is not such a recognition, but is the fulfilment of the condition of a bilateral contract of which the other side is the promise previously given. There is nothing to be acknowledged until both sides of the contract are fulfilled, and then acknowledgment is irrelevant. In the words of Stair,[7] " After contract, or promise of marriage, or *sponsalia*, if copulation follow, then is there presumed a matrimonial consent *de praesenti*." Both elements are necessary and " acknowledgment " cannot be stretched to include both, for the mere act of will can never of itself be sufficient for this form of marriage, and indeed proof of the promise raises a presumption that *subsequens copula* was on the faith thereof without the necessity for any explicit understanding to that effect.[8]

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[4] Walton, p. 24. Fraser, 2nd ed., pp. 229 *et seq.*

[5] 6 & 7 Geo. 5, c. 7, s. 3.

[6] *Mackie* v. *Mackie*, 1917 S.C. 276, 1 S.L.T. 117.

However difficult it may be to bring irregular marriage by promise *subsequente copula* within the ambit of section 1 of the Act, one may assume that it was meant to be included, for otherwise a couple could come to Scotland, promise of marriage could be given, and after *subsequens copula* in Scotland they would be married according to Scots law notwithstanding the Act. The question appears never to have been raised in any court. Can the meaning of the words of section 1 of the Act be stretched to cover promise *subsequente copula*? It might be possible to plead that the word " acknowledgment " in the Act—its obscurity has been commented on above—is meant to be synonymous with " consent," and that the three terms in the Act are meant to cover all cases of interchange of consent within the category of irregular marriages. In that case promise *subsequente copula* would be covered because, in the words of Stair,[9] " Marriage itself consists not in the promise but in the *present consent*, whereby they accept each other as husband and wife, whether that be by words, expressly; or tacitly, by marital cohabitation, or acknowledgment; or by natural commixtion, where there hath been a promise or espousals preceding, for therein is presumed a conjugal consent, *de praesenti*." If such a wide interpretation of "acknowledgment" is accepted, it must still be remembered that the operative date of constitution of marriage will be the date of the *copula*, and not of the promise, etc.

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[7] iii, 3, 42.

[8] *Morrison* v. *Dobson* (1869) 8 M. 347.

[9] i, 4, 6.

But the passage just quoted from Stair itself precludes such a wide interpretation, for "acknowledgment" is apparently intended here to describe the tacit form of present consent now more generally referred to as marriage by *sponsalia de praesenti*,[10] since Stair brackets it with the two other tacit forms of consent constituting Scots irregular marriage, *i.e.*, "marital cohabitation" (*viz.*, cohabitation with habit and repute) and "natural commixtion" (*viz.*, promise *subsequente copula*).

But the extension of the meaning of section 1 of the Act to cover all the possible types of irregular marriage mentioned in Stair's dictum breaks down on another ground: it would then have to include not only promise *subsequente copula*, but also cohabitation with habit and repute. This is manifestly impossible, as it is impossible to speak of the exact date at which a marriage by cohabitation with habit and repute is contracted. It may be possible to say *ex post facto* that from a particular date the cohabitation commenced which, together with habit and repute, is later found to constitute the marriage, but the cohabitation itself is insufficient, and in any case a doubt with regard to fifteen days' cohabitation is unlikely to affect the question since no such marriage is likely to be recognised on less than a year's cohabitation.[11] The view that cohabitation with habit and repute is not meant to be covered by section 1 of the 1856 Act is reinforced by the fact that the Act was repealed in 1939 when the other two forms of irregular marriage were abolished, thereby tacitly recognising its inapplicability to cohabitation with habit and repute, the only form of irregular marriage which remains.

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[10] In its "retrospective" form: "This is my wife," etc., or "We acknowledge each other," etc.

[11] *Cf. Wallace* v. *Fife Coal Co.*, 1909 S.C. 682, 1 S.L.T. 509.

Hence an interpretation of section 1 of the Act which would include promise *subsequente copula* is logically untenable because it would also include cohabitation with habit and repute, which is clearly not meant to be covered by the Act. It would, moreover, involve a wide and inaccurate interpretation of " acknowledge," which necessitated the interpolation of a generic term between two special terms, against all the canons of statutory interpretation.

What is the result of the failure of the Act to cover promise *subsequente copula*? As already stated, it would mean that if a couple came to Scotland before 1940 and instead of marrying under the procedure before the Sheriff in section 2 of the Act (or an alternative form of *sponsalia de praesenti*) exchanged promise and *subsequens copula* in Scotland, they need not observe any further residential qualification, any more than they need do before coming to Gretna to be married prior to the 1856 Act. In *Longworth* v. *Yelverton*, Lord Deas said,[12] of marriages by promise *subsequente copula* and by *sponsalia de praesenti*, " Nor is it necessary that the parties should be what the law regards as domiciled in Scotland. It is enough that they are resident in Scotland for the time being, and that the requisites of the contract, as a purely civil and consensual contract, have taken place in Scotland."

It may be said that such a result would not greatly jeopardise the purposes of the Act since such a situation must be very rare. But it should be remembered that from the nature of the evidential requirements, it must often be possible to plead *sponsalia de praesenti* and promise *subsequente copula* as alternative grounds for declarator of an irregular marriage[13]: the dividing line in fact, though not in law, is extremely difficult to draw, especially if the *sponsalia de praesenti* relied on were informal and not in the form of a proof before the Sheriff described in section 2 of the 1856 Act.[14]

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[12] See 1 M. at p. 170.

[13] *Lockyer* v. *Ferryman* (1877) 4 R.(H.L.) 32; 2 App.Cas. 519

But even supposing a couple to come to Scotland and contract an irregular marriage before the Sheriff in accordance with section 2 of the Act, but without having satisfied the residential requirements of section 1; if they travel back to England—or other country which does not have the Scots forms of irregular marriage—immediately without intercourse having taken place in Scotland subsequently to the marriage, then it is quite clear that the marriage is invalid under section 1 of the Act. If, however, the same couple stay on in Scotland just long enough for intercourse to take place after the marriage, their position is not clear. They are not validly married by declaration *de praesenti* but it would appear that, though the declaration is, by itself, precluded by the Act from constituting *verum matrimonium*, its existence as a solemn *de facto* agreement or contract cannot be gainsaid, and it could therefore, together with *subsequens copula* in Scotland, constitute the alternative form of irregular marriage, since, in Stair's words (*vide supra*), "after *contract*, or *promise* of marriage, or *sponsalia*, if copulation follow, then is there presumed a matrimonial consent, *de praesenti*."[15] The "*sponsalia*," precluded by the Act from themselves constituting *verum matrimonium*, could, it is submitted, still do so when coupled with *subsequens copula* in Scotland.[16] In *De Thoren* v. *Wall* "the ceremony which took place, though invalid, was undoubtedly a consent by the parties to live together as husband and wife. And their subsequent cohabitation was a proof of continued consent."[17] The two situations, it is submitted, are analogous.

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[14] (With the further formalities prescribed by the Marriage (Scotland) Act, 1916.)

[15] iii, 3, 42.

[16] *Cf. De Thoren* v. *Wall and the Att.-Gen.* (1876) 3 R.(H.L.) 28: existence of statutory impediment at beginning of a period of cohabitation with habit and repute is immaterial. And see *Macdonald* v. *Macdonald* (1863) 1 M. 854: written declaration of marriage, ineffective because made in England, was recognised because it was later redelivered to the wife in Scotland.

[17] *Ibid.*; Lord Chelmsford, at p. 33.

Even if it be contended—though this would be denied [18] —that the original *sponsalia de praesenti* are so tainted with illegality as to be incapable of grounding marriage by promise *subsequente copula*, still, the merest renewal of vows, however informal, any time after the invalid *sponsalia*, will supply the deficiency, since once promise is proved *copula* is presumed to be on the faith thereof.[19] The only difficulty here (*i.e.*, supposing that the invalid *sponsalia de praesenti* could not be founded upon) is that if the other party to the action denied the promise, it would probably have to be supported by writing and could not be proved by reference to the oath of that party.[20] This, if it *is* a real difficulty, does not seem an insuperable one, since there are always likely to be letters which will support the alleged promise.

This restricted interpretation, if accepted, would make serious inroads into the effectiveness of Lord Brougham's Act. It might indeed be contended that such an interpretation would render the Act absurd. This is doubtful, and it appears that one is torn between two conflicting tendencies of statutory interpretation: granted the obscurity of section 1, does its wording so compellingly exclude promise *subsequente copula* that the resultant weakening of the efficacy of the Act must be accepted, or is there sufficient doubt as to the meaning that, in deference to the principle that a statute must be interpreted in such a way that its objects are made effective, the meaning of section 1 must be expanded to include promise *subsequente copula*? For the reasons stated, and because the statute is an encroachment on the common law doctrine of marriage and on freedom and security of marriage, it is submitted that it must be interpreted restrictively and so be held not to cover promise *subsequente copula*. It is further submitted that the results would not be absurd. The High Court in England has already, in one case,[21] commented unfavourably upon attempts to rely on the technicalities of Lord Brougham's Act as a pretext for annulling a marriage which had subsisted for several years without complaint by either party. And Walton holds that " unless the marriage appears to have been challenged as soon as the error . . . has been discovered . . . consent will be presumed to have been subsequently given, and the action for nullity will be barred. In England, where a ceremony is essential, and consent must accompany prescribed rites, it may not be clear that supervening consent can cure an initial defect of this kind. But in Scotland, prior to 1940, where mutual consent, however expressed, was all that the law required, matrimonial consent was readily presumed if the marriage was not promptly challenged."[22] Walton is speaking here of essential error, but the remarks ought, in equity, to apply *a fortiori* to errors or defects in form such as are here under discussion.

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[18] See n. 16, *supra*.

[19] *Morrison* v. *Dobson*, 8 M. at p. 354 (*per* Lord Ardmillan). The presumption is rebuttable.

[20] *Longworth* v. *Yelverton* (1867) 5 M.(H.L.) 144.

[21] *Winterbottom* v. *Winterbottom* (1922) 38 T.L.R. 813.

The narrow interpretation suggested would still nullify all irregular marriages in contravention of the residence qualifications which were not consummated in Scotland. Nor would it create difficulties on the question of promise *subsequente copula* in undefended cases, since marriage by this method is not recognised at law until it has been judicially declared by an action of declarator of marriage,[23] and the court cannot *ex proprio motu* declare such a marriage where no such declarator is sought.[24] The effect of the narrow interpretation of the 1856 Act is rather to enlarge the defences open to an action of declarator of nullity brought under the Act in so far that in many cases such an action could be effectively defeated by a cross-action of declarator of marriage by promise *subsequente copula.*

It has always been accepted that a couple who technically infringe the Act by making their declaration, etc., before having resided for twenty-one days in Scotland can remedy this by renewing it when they have completed such residence. It is also submitted, on analogy with marriages where one party was under age, that any marriage invalid under the 1856 Act may be converted into *verum matrimonium* if the parties continue to cohabit in Scotland in circumstances which establish the existence of matrimonial consent after the twenty-one days, either by interchange of consent, etc., provided it is done "solemnly and *ex animo*,"[25] or even by cohabitation alone.[26]

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[22] Walton, p. 53, and authorities there quoted.

[23] Albeit the declarator is retrospective. *N.* v. *C.*, 1933 S.C. 492, S.L.T. 250. *Mackie* v. *Mackie* (*supra*); see also *Bairner* v. *Fels*, 1931 S.C. 674, S.L.T. 489.

[24] *Cf. N.* v. *C.* (*supra*): Facts arising in an action for breach of promise which might suggest marriage by promise *subsequente copula* do not compel the court to declare such a marriage where neither party seeks such a declarator, nor to limit proof to the modes competent in such an action. Also *Bairner* v. *Fels* (*supra*).

Having admitted so much, it is not unreasonable to suggest, as I have tried to do, that no irregular marriage which is *consummated* in Scotland is invalidated by the 1856 Act, and that only those which come within the strict and narrow interpretation of section 1 of the Act are necessarily affected by it.

The position could then be summarised thus:

(1) Where there was declaration *de praesenti* in contravention of the residential requirements of the Act and the parties left Scotland immediately or within twenty-one days without consummating the marriage, the Act applies without qualification, and the marriage is null and void.

(2) Where the parties came to Scotland and contracted a marriage not by *sponsalia de praesenti* but by promise *subsequente copula*, the marriage is valid, and declarator of marriage can be granted though both promise and *copula* took place within twenty-one days of arrival in Scotland, and though both parties left Scotland before the twenty-one days had passed, provided only that both promise and *copula* took place in Scotland. No action of declarator of nullity can be raised under the 1856 Act, which does not apply to this form of marriage.

(3) Where after declaration *de praesenti* in contravention of the residential requirements of the Act, *copula* takes

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[25] *Cf. Johnston* v. *Ferrier* (1770) Mor. 8931. It is submitted that promise *subsequente copula* would satisfy this condition.

[26] *Cf.* Erskine, i, 6, 2. See also Fraser, 1, 51; and *De Thoren* v. *Att.-Gen.* (1876) 3 R.(H.L.) 28; *Fitzwilliam* v. *Att.-Gen.*, *The Times*, March 15, 1951.

place in Scotland, then regardless of the length of further residence in Scotland, action of declarator of marriage on the grounds of promise *subsequente copula* will generally succeed. Action of declarator of nullity based on the Act will succeed unless there is a successful cross-action of declarator of marriage by promise *subsequente copula*; but if no cross-action is raised, decree of nullity will be granted, provided that cohabitation in Scotland did not continue beyond the twenty-one days, and that there was no pre-existing declarator of marriage by promise *subsequente copula*.

(4) Where the same parties stayed in Scotland for twenty-one days they could expressly renew their declaration and would then be truly married despite section 1 of the Act.

(5) Where after the " marriage " they continued to cohabit in Scotland for over twenty-one days but not long enough to establish marriage by cohabitation with habit and repute, and they did not renew the invalid declaration after the twenty-one days, an action of declarator of nullity based on the Act would fail, by reason of acquiescence, or *mora* and acquiescence, if the parties during that time truly and by consent considered themselves married: on the presumption that the *sponsalia*, though originally void under section 1 of the Act, were tacitly renewed when the impediment was removed. For the same reasons, an action of declarator of marriage by *sponsalia de praesenti* or by promise *subsequente copula* would be successful. But where there was no party—whether represented in court or not—with an interest to sustain the marriage, an action of declarator of nullity would probably succeed. (*Cf. Bairner* v. *Fels*, *supra*.)

(6) Where the parties resided in Scotland long enough to establish marriage by cohabitation with habit and repute, what was said in (5) above would apply *a fortiori*, and an additional ground—*viz.*, cohabitation with habit and repute—would exist for an action of declarator of marriage.

NORMAN J. ADAMSON.

CASES AND COMMENT

1. SCOTTISH CASES

NEGLIGENCE —remoteness of damage—suicide after injury.

Cowan and Others v. *National Coal Board*, 1958 S.L.T.(Notes) 19, is principally interesting for its *obiter dicta*. A workman sustained injury to his left eye on September 22, 1954; on January 5, 1955, he was run over by a light engine on the railway; his widow and children claimed damages from the employer in whose employment he had sustained injury. They averred that the accident to his eye was caused by the fault of the defenders, that in consequence he became nervous and depressed, and mentally deranged, with the result that he committed suicide by lying down in front of the oncoming engine. Lord Cameron held that it was not proved that the injury to the eye was caused by the defenders' negligence, nor that the deceased had become mentally deranged, and that the pursuers had failed to establish suicide as an involuntary act of the deceased. In consequence of these findings any question of whether the defenders were liable for the death, *esto* they had been liable for the original injury, was hypothetical and the observations thereon purely *obiter*. Lord Cameron, however, went on to express the view *obiter* that the *ratio* of *Re Polemis* [1921] 3 K.B. 560, was not the law of Scotland; that is, that it is *not* the law of Scotland that, liability for an initial injury having been admitted or proved, the wrongdoer is liable for all the consequences which can be directly traced to that cause.

His Lordship took the view that *Re Polemis* arose out of contract and not out of tort, though all the best English authorities take the opposite view, regarding the charterparty as merely having given rise to the circumstances in which the negligence took place and having no legal effect on the case. Secondly, he pointed out what is undeniable, that on the rules of *stare decisis* *Re Polemis* is not binding on any Scottish court, but the problem to which it supplies an answer (and one not subsequently disapproved by the House of Lords) is common to Scotland and to England, and it is doubtful if common sense would dictate or the House of Lords permit different answers in the two legal systems.

But, thirdly, it is most regrettable to find his Lordship basing his further remarks on Lord Macmillan's *obiter dicta* in *Bourhill* v. *Young*, 1942 S.C.(H.L.) 78; 1943 S.L.T. 105, that *Polemis* is probably not the law of Scotland, for which there is no foundation whatever, and also on a string of previous Scottish cases which have deceived countless judges, counsel, and students because the words "remoteness of damage" are used in the rubric, but which do not deal with remoteness of damage at all, but with the logically prior problem of whether there is any liability at all for the initial injury, or whether it is too remotely connected with any *culpa* on the defender's part to infer any liability in damages at all. The fact cannot be too strongly emphasised that there are *two* problems; (1) whether any loss or injury is sufficiently closely connected with the defender's *culpa* to make him liable at all, and (2) whether the consequences to the pursuer of the immediate loss or injury are sufficiently closely connected therewith as to be fairly attributable also to the defender's fault, and hence to be accountable also in the tale of damages. Problem (1) is liability, and the test is: was some injury to the pursuer reasonably foreseeable by the defender? If so, he is liable. Problem (2) is the true problem of remoteness, and the test is, in Scotland, undecided, as Lord Cooper pointed out in *Steel*, 1944 S.C. 237; 1945 S.L.T. 70. That problem is: the defender being admitted or proved to be in fault and liable for the immediate injury to the pursuer, for what consequences (direct, or natural, or reasonably foreseeable, consequences) thereof is he also liable? All the Scottish cases cited by his Lordship and by previous judges deal *only* with problem (1); problem (2) has never arisen squarely for decision by any Scottish court, the nearest approach to a decision being by the House of Lords in *Baron Vernon* v. *Metagama*, 1928 S.C.(H.L.) 21; 1928 S.L.T. 117. When problem (2) does arise, it is to be hoped that discussion of the true answer will not be muddled by citation of these or other cases on problem (1). It may be that the proper Scottish answer to problem (2) is "reasonably foreseeable consequences only" and not "direct" or "natural and direct" consequences; but, with respect to his Lordship, there is no authority whatever in Scotland for "reasonably foreseeable" as the anwer to problem (2) and considerable authority in favour of "direct."

In this kind of case it is very important to separate the two problems and the older cases all failed to do this, but confused them: so too the textbooks, such as *Glegg*, are just muddled on the point, and the Reports and Digests further confuse the issue by talking of "remoteness of damage" in cases raising only problem (1), the problem of liability. It does not greatly matter what answer the courts eventually return to problem (2), so long as they recognise that problems (1) and (2) are separate, that the older authorities deal with (1) only, and that it is complete misinterpretation to read them as saying anything about problem (2). Lastly, if "reasonably foreseeable" is truly the test for problem (2), how is it that there appear to be no reported decisions in which a defender has been found liable for *culpa* and yet some part of the damages claimed have been disallowed as going beyond reasonable foresight of the consequences of that delict? The answer, it is submitted, is that the courts in practice tacitly answer, and have always answered, problem (2) by allowing damages for *all direct* consequences.

Moreover, in his final formulation of his own answer to problem (2) (or is it (1), or (1) and (2)?) Lord Cameron says "The true test . . . is whether the death *naturally and directly* arose out of the supposed wrong done to him and was *therefore* such a consequence as might *reasonably* be supposed to have been *in the view of the wrongdoer*." This equates "natural and direct" with "reasonable foresight," whereas earlier cases regarded them as different, natural and direct consequences possibly going beyond foreseeable consequences.

The actual decision in this case is right but it is very regrettable that such carefully prepared *obiter dicta* should have been based on what is submitted to be a misunderstanding of the earlier authorities, and on excessive deference to judges and writers who did not understand the problems involved.

D. M. W.

EVIDENCE—
blood-tests—
declarator of
bastardy.

Imre v. *Mitchell and Others*, 1958 S.L.T. 57, was an unusual action in that a married woman, who had been divorced by her previous husband, sought declarator that a child born to her three weeks before the prior marriage was a bastard. The underlying purpose of the action was to obtain custody of the child from the first husband, and the pursuer relied strongly on the evidence of blood-tests. The judgment of

Lord Wheatley, who granted decree, is important for its analysis of the cogency of such scientific evidence as discharging the onus of proof. He accepted evidence which had a very high probability of accuracy as sufficient to justify decree, but was ready to accept non-medical evidence as confirming or refuting the conclusions to which the medical evidence led; in the circumstances he held that the non-medical evidence gave no reason to doubt the medical evidence, and granted decree. The observations on the probative value of such blood-test evidence are valuable, particularly in their insistence that with the progress of scientific knowledge the courts must be ready to revise their views on medical problems.

D. M. W.

CRIMINAL PROCEDURE—Verdict.

Lord Advocate v. *Nicholson*, 1958 S.L.T.(Sh.Ct.) 17, revealed a difficulty, hitherto apparently unsuspected, in the Scottish system of having three possible jury verdicts, Guilty, Not Guilty, and Not Proven. The possibility is that a majority verdict of guilty may in fact conceal what is truly a minority, there being a majority for not guilty *plus* not proven, which both infer dismissal from the dock and freedom from penalty. Counsel for the panel having asked what the majority was for the verdict of Guilty, the foreman said " we were six for guilty, five for not guilty, and four for not proven." A verdict of not guilty was then recorded, there being no suggestion that it be not proven, though this might have been a fairer reflection of the general view of the jury. But more important: was counsel entitled to ask the majority? This seems doubtful, but it is undoubtedly salutary that the court should know. Secondly, this case does reveal the dangerous fact that if six or seven jurors vote for guilty and the others are split, as they were here, the verdict may be returned incorrectly. No problem arises if eight or more are for guilty. It seems clearly desirable that in future, in every case of a majority verdict, the foreman should be required to state the numbers for each possibility, so as to avoid any chance of a miscarriage of justice.

D. M. W.

CRIME—sentence—competency.

Grey v. *H.M. Advocate*, 1958 S.L.T. 147, raised an unusual point on the competency of sentences. Grey had imposed on him by an English court a sentence of imprisonment which he was serving in England, and while doing so, he was, at his own request, transferred to Scotland. He was then charged on indictment in Scotland with assault and robbery aggravated by previous convictions, other than that for which he was in prison in England. He pled guilty and was sentenced to six years' imprisonment, to date from the expiry of the sentence of the English court. An appeal was brought against the competency of that sentence. It has long been the Scottish practice to impose a sentence commencing at the conclusion of a current sentence: *H.M. Advocate* v. *Graham* (1842) 1 Broun 445; and there seemed no reasonable ground for differentiating between a Scottish and an English current sentence. As the court observed, to hold such procedure incompetent would be in some cases to deprive the courts of all power of punishing an individual, simply because he happened to be already undergoing punishment. Lord Sorn put the matter neatly by saying that in pronouncing a consecutive sentence the court was not adopting or approving, or giving weight to, a foreign conviction but simply recognising that the accused was already deprived of liberty and that, so long as that lasted, the court was powerless to punish him, but must wait until it could do so.

D. M. W.

REPARATION—title to sue—trustee in bankruptcy.

Muir's Tr. v. *Braidwood*, 1958 S.L.T. 149, rightly decided a point of title to sue for reparation. M. was injured in a road accident; his estates were then sequestrated and a trustee in bankruptcy appointed. The latter raised an action against the driver of the other vehicle involved concluding for damages for patrimonial loss and for personal injuries. The defender admitted liability and the jury trial proceeded on the quantum of damages only. In opening the case pursuer's junior counsel claimed only solatium, and defender's counsel asked for a direction that the pursuer, being a trustee in bankruptcy, was not entitled to institute an action for solatium. A verdict was taken from the jury under reservation of the point of law and, after argument, the defender was assoilzied, and this view was affirmed by the Second Division. The essential point in fact is that the claim for damages is composite, partly personal (solatium) and partly proprietary (patrimonial loss). The former element is compensation for loss to the man's own well-being, to himself, not to his estate, and he alone deserves to be compensated, but the latter element is a loss to his estate, as when his car is smashed and thereby much diminished in value, and hence a loss to what transmits to his executor or trustee in bankruptcy, a loss to the fund available for his creditors. It is clear inferentially from this decision that the trustee *can* sue for patrimonial loss, but nothing is said about the title to sue of the bankrupt himself for solatium for his injuries. On principle that should be sustained and any damages awarded *nomine solatii* should be claimed by him personally, not by the trustee, and should fall to him personally and not into the estate carried to the trustee by his Act and Warrant. Pain and suffering do not diminish the assets available for creditors and any compensation therefor should not augment them, since it is given to the man himself, to make up, so far as money can do so, for what has been taken away from him personally, in limb or health or pain. It seems slightly surprising that this point had not arisen before and that, the circumstances having arisen, the claim by the trustee for solatium should ever have been pressed, when it appears so weak in principle.

D. M. W.

CRIME—escape from corrective training—sentence.

In *Winning* v. *H.M. Advocate*, 1958 S.L.T. 135, the High Court had to work out another problem of sentencing policy. W. had been sentenced to four years' corrective training in October, 1954. While serving that sentence he escaped in August, 1957, was at large for ten days, and during that time committed further crimes to which he pled guilty. It was apparent that punishment for the escape and further crimes was necessary, and that a sentence of imprisonment to run from the end of corrective training was inappropriate, since the object of corrective training was to fit a man to take part in the ordinary life of the community, and the prospect of imprisonment rather than liberty at the end of corrective training seemed likely to frustrate the purpose of the corrective training. Moreover the prisoner's conduct suggested that corrective training was not having much effect. In the result the court, following the English decision of *Hedgecock*, 41 Cr.App.R. 136, imposed a sentence of three years' imprisonment to take effect at once (November, 1957) and supersede the unexpired portion of the corrective training, and which would also run, even with maximum remission for good conduct, to November, 1959, and so outlast the period for which the panel had originally been committed for corrective training. The last point seems material, as it would frustrate the objects of imprisonment if the further sentence were to end earlier than the original one. What would happen if a man sentenced to, say, ten years' preventive detention, were after one year to escape and commit fresh offences? He would, it seems, either have to be given at least ten years' imprisonment or a lengthened period of preventive detention.

D. M. W.

2. ENGLISH CASES

VICARIOUS LIABILITY: Scope of employment: Right of relief against guilty servant.

Harvey v. *R. G. O'Dell and Another* ([1958] 2 W.L.R. 473) raised a wide variety of legal points. The plaintiff was a workman employed by the defendant firm of builders and repairers, and was engaged with a fellow-workman on repair work on his employers' behalf at Hurley. The fellow-workman was a storekeeper and owned a motor-cycle combination which he used from time to time for the defendants' business; he paid for his petrol, but when out on the defendants' business received a travel allowance based on the cost of public transport, and was also paid for travelling time. When instructed to go to Hurley he was also instructed to take the plaintiff with him as his mate in his side-car. On the way back to Hurley after a journey to obtain tools for the work from a neighbouring town, the motor-cycle came into collision with a car. The plaintiff received injuries and his fellow-workman, who owned the motor-cycle combination, was killed. The accident was due, in part at least, to the negligence of the fellow-workman. In an action by the plaintiff for damages it was held that his fellow-workman when killed was acting within the scope of his employment, and that, accordingly, his employers were vicariously responsible for his negligence. The defendants then instituted third party proceedings against the fellow-workman's widow, as administratrix of his estate, which proceedings were instituted about three years after the widow had been granted her letters of administration. Under English law, however, and in terms of section 1 (3) (*b*) of the Law Reform (Miscellaneous Provisions) Act, 1934, no proceedings are maintainable in respect of a cause of action in tort which survives against the estate of a deceased person unless, *inter alia*, proceedings are taken in respect thereof not later than six months after his personal representative took out representation. It was held, however, that since the right to contribution between tortfeasors was a right *sui generis* conferred by the Law Reform (Married Women and Tortfeasors) Act, 1935 (the English equivalent of the Law Reform (Miscellaneous Provisions) (Scotland) Act, 1940), proceedings for contribution under section 6 (1) of the 1935 Act were not " proceedings . . . in respect of a cause of action in tort " within the meaning of section 1 (3) of the Act of 1934. Alternatively, the court held that section 1 of the 1934 Act was not by its terms comprehensive, and the present claim for contribution survived against the administratrix like any other claim not expressly dealt with by the section. The court also had to consider the construction of the phrase " who . . . would if sued have been liable " contained in section 6 (1) (*c*) of the 1935 Act. It was held that this phrase contained no temporal connotation, other than that the hypothetical action contemplated had been instituted at some time before the claim for contribution arose and read " who, if sued at any time, would have been liable "—accordingly, the fellow-workman's administratrix was liable to indemnify the defendants in respect of their liability to the plaintiff.

This point is of importance for the bearing it may have in Scotland on the question of the prescription of actions under the Law Reform (Limitation of Actions) Act, 1954, in relation to rights of relief under the Law Reform (Miscellaneous Provisions) (Scotland) Act, 1940.

A final matter of interest raised in this case was the failure of the defender's alternative argument based on the fellow-workman's breach of implied contract to drive his motor-cycle combination carefully. The court was able to distinguish *Lister* v. *Romford Ice and Cold Storage Co., Ltd.* ([1957] A.C. 555) on the ground that the fellow-workman had been engaged and employed as a storekeeper and not as a driver and, accordingly, there was no implied contract to drive carefully.

W. A. E.

NEGLIGENCE: Protective clothing: whether workman would have used.

Haynes v. *Qualcast (Wolverhampton), Ltd.* ([1958] 1 W.L.R. 225) is chiefly of interest for its discussion of the effect of the House of Lords decision in the Scottish appeal of *Wardlaw* v. *Bonnington Castings* (1956 S.C. (H.L.) 26, S.L.T. 135). It will be recollected that in that case it was held that the onus was still on the plaintiff where the defenders were proved to be in breach of duty, to prove that this breach caused his accident. The plaintiff in *Haynes* was an experienced moulder who was injured when molten metal splashed on to his foot in a foundry. Although the employers kept a store of protective spats and boots which would have prevented the accident, they did nothing to educate their workmen to wear them. The county court judge held that the employers were 25 per cent. to blame for the accident and the plaintiff himself 75 per cent. to blame. On appeal, it was, *inter alia*, contended for the employers that the pursuer's injuries were not proved to be attributable to any breach of duty on their part. as owing to the man's experience it was quite apparent that further encouragement would not have caused him to wear the protective spats or boots. They argued that *Wardlaw* had impliedly overruled the decisions of the English Court of Appeal in *Roberts* v. *Dorman Long & Co., Ltd.* ([1953] 1 W.L.R. 942) and *Drummond* v. *British Building Cleaners, Ltd.* ([1954] 1 W.L.R. 1434). In the *Drummond* case Parker L.J. said: " In my view . . . the defendants having failed in their duty by not giving him instructions to use the rope, cannot be heard to say that even if they had, he would not have used it." Lord Evershed M.R. said that whatever the effect of *Wardlaw* on the earlier cases, it was undoubtedly still the law that the question of causation was one of fact to be considered in the light of all the circumstances and probabilities. As the trial judge, properly considering these matters, concluded as a fact that to the extent of 25 per cent. the plaintiff's damage was attributable to the defendants' breach of duty, there was no ground in law for disturbing that conclusion.

W. A. E.

PASSING OFF AND INFRINGEMENT OF TRADE MARK: Risk of confusion: bona fide use of own name on goods.

In *Baume & Co., Ltd.* v. *A. H. Moore, Ltd.* ([1958] 2 W.L.R. 797) the facts were that the plaintiffs, an English company, carried on the business of the sale of watches and were the proprietors of the registered mark "Baume." The defendant company also sold watches bearing the mark "Baume & Mercier, Genève" or "Geneva," which were manufactured by the well-established Swiss firm of Baume & Mercier S.A. In an action at the instance of the plaintiffs to restrain passing off it was held that there was no exception to the rule that no man was entitled so to describe or mark his goods as to represent that they were the goods of another, and that, accordingly, it was not a defence that there was no intention to deceive. Accordingly, as the plaintiffs had established that the sale by the defendants of Baume & Mercier watches was reasonably calculated to cause confusion in the trade and in the minds of the public, their claim of passing off succeeded. The plaintiffs also pleaded infringement of their trade mark. It was observed *per curiam* that inasmuch as the defendants had incorporated the whole of the plaintiffs' registered mark in their own mark, albeit that it contained in addition the words "& Mercier, Genève" or "Geneva," they were in breach of section 4 (1) of the Trade Marks Act, 1938; but that, as the use of such name was a bona fide use on the defendants' goods of the name of the manufacturer, they were protected by section 8 (*a*) of the Act of 1938, which protected such use of the manufacturer's name as a trade mark. In this respect, therefore, the common law appears to be more exacting than the statute law.

W. A. E.

In *Manning* v. *Manning* ([1958] 2 W.L.R. 318) a wife, domiciled in England, obtained in Norway a Norwegian decree of

CONFLICT OF LAWS: Divorce: recognition of foreign decree based on residential qualification.

divorce based upon a period of separation. The jurisdiction of the Norwegian tribunal was founded upon the fact that the last common residence of the parties had been in Norway, although the wife, who was Norwegian by birth, had in fact been ordinarily resident in Norway for considerably more than three years before the decree. The husband, who remained a domiciled Englishman, presented a petition for a declaration that the Norwegian decree was valid and the marriage thereby dissolved or, in the alternative, for decree of divorce on the ground of desertion. The court held that the Norwegian divorce decree was valid and should be recognised upon a basis of reciprocity as the wife had been ordinarily resident in Norway for a period of more than three years before her application for a divorce, which residential period would have given the English courts jurisdiction in the converse situation. The fact that the grounds for the divorce were not grounds recognised in the English courts did not matter, as this was for the *lex fori* provided those grounds did not offend against natural justice as conceived in the English courts. The law would, of course, be the same where jurisdiction of the foreign court is based on the *lex domicilii.* Reciprocity in regard to jurisdiction on other grounds, however, does not yet appear to have been accepted by the Scottish courts. *Warden* v. *Warden* (1951 S.C. 508, S.L.T. 406).

W. A. E.

3. PRIVY COUNCIL CASES

PARLIAMENTARY PRIVILEGE.

Re Parliamentary Privilege Act, 1770 ([1958] 2 W.L.R. 912), was a Special Reference, under section 4 of the Judicial Committee Act, 1833, made pursuant to a recommendation of the Committee of Privileges of the House of Commons and an Order in Council dated December 13, 1957, of the question of law " whether the House of Commons would be acting contrary to the Parliamentary Privilege Act, 1770, if it treated the issue of a writ against a member of Parliament in respect of a speech or proceeding by him in Parliament as a breach of its privileges." On February 8, 1957, a member of the House of Commons wrote a letter to the

Paymaster-General criticising the London Electricity Board's method of disposing of scrap cable. The Paymaster-General, being of the opinion that the question related to a matter of day-to-day administration, replied to the member that the responsibility lay with the board, not with the Minister, and that he had arranged for his officials to bring the views of the member to the attention of the board's chairman as a matter of urgency. After an interview between the chairman and the member and some of his associates, the chairman wrote to the member demanding the unqualified withdrawal of the statements in the letter of February 8, which the chairman regarded as casting grave reflections on the integrity of the board's personnel and on. the board's attitude towards its public duty. No satisfactory reply having been received, he referred the matter to the board's solicitors, who wrote to the member demanding a withdrawal and an apology, and stating that if these were not forthcoming they were instructed to issue a writ for libel against him. The member's solicitors replied that the letter appeared to them to have been written on a privileged occasion, and that they were prepared to accept service of any proceedings on his behalf.

No writ had in fact been issued when, on April 6, 1957, the member called the attention of the House of Commons to the letters that had passed between himself and the board and its solicitors, and claimed that the threat of an action for libel was a breach of the privilege of Parliament. The Speaker of the House of Commons ruled that the threat constituted a prima facie case of breach of privilege. The House referred the matter to its Committee of Privileges which reported on October 30, 1957. They pointed out that the answer to the question whether the threat constituted in itself a breach of privilege depended in the main on the meaning of Article 9 of the Bill of Rights, 1688, but, having had their attention called to the possible impact of the Parliamentary Privilege Act, 1770, on the question, came to the following conclusions:

(*a*) In writing the letter of February 8, 1957, to the Paymaster-General of which the London Electricity Board complained, the member was engaged in a " proceeding in Parliament " within the meaning of the Bill of Rights. (*b*) The London Electricity Board in threatening by the letters from themselves and their solicitors to begin proceedings for libel against the member for statements which he had made in the course of a proceeding in Parliament were threatening to impeach or question the freedom of the member in a court or place outside Parliament, and accordingly the board and their solicitors had acted in breach of the privilege of Parliament. (*c*) The opinion of the Judicial Committee of the Privy Council should be sought on the question whether the House would be acting contrary to the Parliamentary Privilege Act, 1770, if it treated the issue of a writ against a member of Parliament in respect of a speech or proceeding by him in Parliament as a breach of its privileges.

The Judicial Committee stated that the question before them was a very narrow one, and was independent of the conclusions (*a*) and (*b*) of the Committee of Privileges on which their Lordships were not required to, and did not, express any opinion. Article 9 of the Bill of Rights, 1688, declared that: " The freedom of speech and debates, or proceedings in Parliament, ought not to be impeached or questioned in any court or place out of Parliament." In 1700 the first group of Acts was passed which fell for their Lordships' consideration. The ambit of the later Acts was not greater than that of the earlier. That Act (12 & 13 Will. 3, c. 3) was " for preventing any inconveniences that may happen by privilege of Parliament," and its opening words were: " For the preventing of all delays the King or His subjects may receive in any of His courts of law or equity and for their ease in the recovery of their rights and titles to any lands, tenements or hereditaments and their debts or other dues for which they have cause of suit or action." That being the declared purpose of the Act, it went on to enact that any person might begin and prosecute any action or suit against any Lord of Parliament or against any of the Knights, citizens and burgesses of the House of Commons, or against any other person entitled to the privilege of Parliament at any time from and immediately after the dissolution or prorogation of any Parliament until a new Parliament met, and from and immediately after any adjournment of both Houses of Parliament for above the space of fourteen days until both Houses shall meet or reassemble, and that the courts " shall and may after such dissolution, prorogation or adjournment proceed to give judgment and to make final orders, decrees and sentences and award execution thereupon, any privilege of Parliament to the contrary notwithstanding."

The language of that section was comprehensive and apt to cover any suits, including suits for defamation whether in or out of Parliament, and in every case to bar the plea of any privilege of Parliament. Though it should, prima facie, be read in that sense, there were considerations pointing to a necessary limitation of its meaning. First, the declared purpose of the Act was to prevent delay in the bringing of those actions to which the Act related. Members had long abused their privileges of immunity from civil actions and arrest which, by ancient usage, extended during the sitting of Parliament and for forty days after every prorogation and forty days before the next appointed meeting. The Act was passed to curtail that delay, and by clear implication it referred only to those suits which, subject to delay, were ultimately enforceable. But there was no right at any time to impeach or question in a court or place out of Parliament a speech, debate or proceeding in Parliament. No question of delay or ultimate enforceability could arise with regard to that privilege which demanded that a member should be able to speak without fear or favour in Parliament in the sure knowledge that neither during its sitting nor thereafter would he be liable to any man for what he said, and that Parliament itself would protect him from any action in respect of it. There, then, was a strong reason for limiting the meaning of the general words which had been quoted.

Secondly, the section empowered not only the subject to " commence and prosecute any action or suit," but the court to proceed " to give judgment and to make final orders, decrees and sentences and award execution thereupon." The last words of the section, " any privilege of Parliament to the contrary notwithstanding," must apply equally to all the preceding words. If the Act was read to apply to speeches in Parliament, the effect was substantially to repeal the ninth Article of the Bill of Rights. It was not a question of a writ being issued in a court of law and the defendant then making a plea in bar or a plea to the jurisdiction on the ground of privilege of Parliament. Final orders, decrees, sentences and execution might follow the commencement and prosecution. and no plea of privilege was to be available. A consideration of that consequence supported the view that the Act applied only to proceedings against members of Parliament in respect of their debts and actions as individuals and not in respect of their conduct in Parliament as members of Parliament, and did not abridge or affect the ancient and essential privilege of freedom of speech in Parliament. The conclusion that that privilege, solemnly reasserted in the Bill of Rights, was within a few years abrogated or at least vitally impaired could not lightly be reached. The sections of the Act of 1700 following section 1 supported, or at least did not militate against, that view.

The Acts of 1703 (2 & 3 Anne, c. 12) and 1738 (11 Geo. 2, c. 24), threw no additional light on the scope of the earlier Act, and an Act of 1763 (4 Geo. 3, c. 33) was in no way relevant to the question which had to be determined. Finally came the Act of 1770, the immediate subject of reference. Little remained to be said about it, for it was clear, as already stated, that it did not extend the ambit of section 1 of the Act of 1700, and that its only relevance was that it altogether abolished the time of privilege during which suits might not be begun or prosecuted against members of Parliament. It followed that their Lordships must answer the question put to them in the negative. They repeated that they answered that and no other question. They did not intend expressly or by implication to pronounce on any other question of law. In particular they expressed no opinion whether the proceedings out of which the reference arose were "a proceeding in Parliament," a question not discussed before them, nor whether the mere issue of a writ would in any circumstances be a breach of privilege. In taking that course they had been mindful of the inalienable right of Her Majesty's subjects to have recourse to her courts of law for the remedy of their wrongs, and would not prejudice the hearing of any cause in which a plaintiff sought relief.

CITIZENSHIP: "Civil suit or action": jurisdiction.

Tennekoon, Commissioner for Registration of Indian and Pakistani Residents v. *Duraisamy* ([1958] 2 W.L.R. 994) was an appeal from a judgment of the Supreme Court of Ceylon. The respondent (referred to as the applicant) had applied for the registration of himself, his wife and his four children as citizens of Ceylon. One of the deputy commissioners refused the application, but it was allowed on appeal to the Supreme Court. From that decision the Commissioner appealed with the leave of that court, the main question being whether the deputy commissioner was justified in holding that the applicant had failed to prove that he was " permanently settled in Ceylon " within the meaning of section 22 of the Indian and Pakistani Residents (Citizenship) Act, No. 3 of 1949, as amended by section 4 of the Indian and Pakistani Residents (Citizenship) (Amendment) Act, No. 37 of 1950. The applicant applied under section 4 (1) of the Act of 1949. The Board discussed the relevant legislation and referred to the facts, and came to the conclusion that the Supreme Court was right in allowing the appeal. In the course of their opinion on this part of the case they said that the Act made no reference to domicile, and the question of proving a change of domicile did not come into the matter at all. The Act placed on the applicant the burden of proving that at the time of his application he had an intention to settle permanently in Ceylon. Apart from his signature on what was known as the " B " form for the purposes of remittances to his mother in India, no action of the respondent indicated that his residence in Ceylon was of a temporary nature. On the contrary, his conduct throughout pointed strongly to an intention to settle permanently in that country and the deputy commissioner was not justified in treating the statement on the " B " form as a sufficient ground for refusing the application.

Before counsel for the Commissioner opened the appeal, counsel for the applicant took a preliminary objection to the jurisdiction of the Board on the ground that the Supreme Court had no power to give leave to appeal to the Judicial Committee in this case. The applicant had appealed to the Supreme Court under section 15 of the Indian and Pakistani (Citizenship) Act, 1949. By section 3 of the Appeals (Privy Council) Ordinance of Ceylon: " From and after the commencement of this Ordinance the rights of parties to civil suits or actions in the Supreme Court to appeal to His Majesty in Council against the judgments and orders of such court shall be subject to and regulated by " [rules set out in the schedule]. By rule 1. " Subject to the provisions of these rules an appeal shall lie . . . (*b*) at the discretion of the court . . . if, in the opinion of the court, the question involved . . . is one which, by reason of its great general or public importance or otherwise, ought to be submitted to His Majesty in Council for decision." The Supreme Court granted leave on the ground that its decision involved a question of "great general or public importance." Before the Supreme Court the applicant agreed with that, but contended that no appeal lay from its decision on the ground that an appeal under section 15 of the Act of 1949 was not a " civil suit or action in the Supreme Court " within the meaning of section 3 of the Ordinance. That argument having been rejected, it was contended before the Judicial Committee that the Supreme Court was wrong, that they had no power to grant leave to appeal, and that their Lordships had no jurisdiction to hear the appeal unless or until an application to Her Majesty for special leave to appeal had been successfully made.

Their Lordships stated that the words " civil suit or action " first occurred in section 52 of the Ceylon Charter of Justice, 1833, which conferred the right of appeal to the Privy Council " against any final judgment, decree or sentence, or against any rule or order made in any such civil suit or action, and having the effect of a final or definite sentence; and which appeals shall be made subject to " certain rules and limitations, which, among others, excluded cases considered to be of insufficient importance for such an appeal. It was argued before the Supreme Court and their Lordships that a civil suit or action meant a proceeding in which one party sued for or claimed something from another. No doubt the words were properly applicable to such cases, and they were the cases to which the words were most frequently applied. But it was necessary to inquire whether the application of the words as they appeared in section 52 of the Charter must be limited to such cases. That section granted to a subject labouring under a sense of grievance the fundamental right of appealing to the Sovereign, and though it would be natural to exclude from the range of permissible appeals cases of insufficient importance, it would be difficult to imagine an intention to exclude cases differentiated by reference to the form of the proceedings, regardless of the gravity of the result occasioned by them. And as section 3 of the Appeals Ordinance set out the manner in which " the right of parties to civil suits or actions in the Supreme Court to appeal to His Majesty in Council " was to be regulated, their Lordships did not doubt that the words " civil suits or actions " must be given the meaning which they bore in the Charter of 1833. Their Lordships could not accept the view of Basnayake C.J. in *Silverline Bus Co., Ltd.* v. *Kandy Omnibus Co., Ltd.* ((1956) 58 N.L.R. 193, at p. 213) that the words " civil suit or action " in section 3 of the Appeals Ordinance should be limited to " a proceeding in which one party sues for or claims something from another in regular civil proceedings." The appeal was dismissed.

COLLECTIVE FINE: validity.

In *Ross-Clunis* v. *Papadopoullos and Others* ([1958] 1 W.L.R. 546) the appellant, the Commissioner of Limassol, Cyprus, appealed from a judgment of the Supreme Court of Cyprus in its appellate jurisdiction, dismissing his appeal from the Supreme Court in its original jurisdiction which had directed that an order which the appellant had made on July 4, 1956, under the Cyprus Emergency Powers (Collective Punishment) Regulations, 1955, as amended, made under the Emergency Powers Order in Council, 1939, be removed into the Supreme Court and quashed. The question for decision was whether the order which the appellant made on July 4, 1956, was valid or invalid. The order imposed a fine of £35,000 on the assessable Greek-Cypriot inhabitants of the area of the municipality of Limassol. Section 6 (1) of the Emergency Powers Order in Council, 1939, provided : " The Governor may make such regulations as appear to him to be necessary or expedient for securing the public safety . . . the maintenance of public order." By regulation 3 of the Cyprus Emergency Powers (Collective Punishment) Regulations, 1955, made under the Order in Council of 1939 : " If an offence has been committed . . . within any area of the Colony . . . and the Commissioner has reason to believe that all or any of the inhabitants of the said area have : . . . (*c*) failed to take reasonable steps to prevent the commission of the offence ; or (*d*) failed to render all the assistance in their power to discover the offender or offenders . . . it shall be lawful for the Commissioner, with the approval of the Governor, . . . (1) to order that a fine be levied collectively on the assessable inhabitants of the said area." By regulation 5 : " (1) No order shall be made under regulation 3 . . . unless an inquiry into the facts and circumstances giving rise to such order has been held by the Commissioner. (2) In holding inquiries under these regulations the Commissioner shall satisfy himself that the inhabitants of the said area are given adequate opportunity of understanding the subject-matter of the inquiry and making representations thereon, and, subject thereto, such inquiry shall be conducted in such manner as the Commissioner thinks fit."

The order of July 4, 1956, stated that a number of murders, attempted murders and other terrorist offences had been committed between January 1, 1956, and June 10, 1956, within the municipality of Limassol (the said area), which offences, in the Commissioner's opinion, were prejudicial to the internal security of the Colony and to the maintenance of public order there. He said that he had reason to believe that a substantial number of the Greek-Cypriot inhabitants of the area had failed to take reasonable steps to prevent the commission of the offences and failed to render all assistance in their power to discover the offenders. He further stated that he had held an inquiry into the facts and circumstances appertaining to the offences after having given adequate opportunity to the inhabitants of the area of understanding the subject-matter of the inquiry; that he had submitted a written report of the inquiry to the Governor and had certified that the requirements of regulation 5 had been complied with; and that, in exercise of the powers vested in him under regulation 3, and with the approval of the Governor, he had ordered that a fine of £35,000 be levied collectively on the assessable Greek-Cypriot inhabitants of the area.

The respondents, representative Greek-Cypriots, applied to have the order quashed on the grounds, *inter alia*, that regulation 3 went beyond the powers vested in the Governor by section 6 (1) of the Order in Council and was *ultra vires*. They submitted that the specific powers set out in section 6 (2) were illustrative of the type of regulation covered by the general words in section 6 (1), and that those general words should not be construed so widely as to cover such a regulation as regulation 3. The imposition of a collective fine, they said, resulted in the punishment of the innocent for the crimes of the guilty and was contrary to British ideas of justice. They further contended that the requirements of regulation 5 (2) in relation to the inquiry had not been complied with. Affidavit evidence on behalf of the appellant and the respondents set out their respective views of what had occurred at the inquiry.

Their Lordships stated that regulation 3 was clearly " related to the purposes prescribed " by section 6 (1) of the Order in Council of 1939 within the meaning of those words in *Attorney-General for Canada* v. *Hallet and Carey, Ltd.* ([1952] A.C. 427, at p. 450) and was *intra vires*. The purpose of imposing a collective fine in a case where crimes had been committed in a particular area, and some or all of the inhabitants of the area had " failed to take reasonable steps to prevent the commission of the offence," or had " failed to render all the assistance in their power to discover the offenders or to effect their arrest " was to ensure, so far as possible, that in future those inhabitants would adopt a different attitude, more helpful to " securing the public safety " and to " the maintenance of public order," two of the purposes mentioned in section 6 (1).

Counsel for the respondents further contended that the Commissioner had failed to comply with regulation 5 (1) and (2). The question of substance there, said their Lordships, was whether the Commissioner had discharged the positive duty cast on him to " satisfy himself that the inhabitants of the said area are given adequate opportunity of understanding the subject-matter of the inquiry and making representations thereon." If it could be shown that there were *no* grounds on which the Commissioner could be so satisfied, a court might infer either that he did not honestly form that view, or that in forming it he could not have applied his mind to the relevant facts. In the present case, however, there were ample grounds, as stated in his affidavit evidence, on which the Commissioner could feel " satisfied " on the matters mentioned in regulation 5 (2).

Counsel for the respondents submitted other objections to the manner in which the Commissioner conducted his " inquiry into the facts and circumstances," but in their Lordships' opinion there was no substance in any of them. Regulation 5 (2) provided that, subject to the positive duty already mentioned, which was fully discharged, " such inquiry shall be conducted in such manner as the Commissioner thinks fit." The manner was thus a matter for the Commissioner and not for the court. But their Lordships thought it only fair to say that the careful steps which the Commissioner took, as set out in his two affidavits, seemed to them adequate and sensible. The appeal would be allowed.

CURRENT PERIODICAL LITERATURE

By K. W. B. Middleton, b.a., ll.b., Advocate, Sheriff-Substitute of the Lothians and Peebles

THE FRANKS REPORT.

The legal event of the year 1957 was no doubt the publication of the Report of the Franks Committee on Administrative Tribunals and Enquiries, and much attention has been devoted to the Report in recent issues of legal periodicals. On the whole, it has been very favourably received by lawyers. What civil servants think is not divulged, but it would not be surprising if they are less well pleased. Professor Robson, writing in *Public Law* for Spring 1958, summarises the achievements of the Committee as follows: (1) it has been made clear that administrative tribunals and public inquiries are a permanent, valuable and accepted part of our system of government; (2) the report has laid down in an admirable manner the general principles which should govern the procedure of tribunals and inquiries; (3) " a permanent focus of interest, knowledge and scrutiny " concerning tribunals and inquiries is to be established in the shape of the Council on Tribunals proposed by the Committee and provided for in the Bill at present before Parliament; (4) a uniform system of appeals both to higher tribunals and to the courts has been prescribed; (5) the Report seeks to integrate administrative tribunals with the regular courts by means of the appeal on points of law, and with the legal profession by means of legally qualified chairmen and the right of legal representation; (6) the Report secures to a substantial extent the severance of administrative tribunals from the Departments with which they are associated; (7) a great deal of " the mystery-mongering " which has hitherto surrounded public inquiries is to be swept away and " the decision-making process in departmental administration " will be forced to come into the light of day.

These are considerable achievements, as Professor Robson says, but he thinks that much remains to be done. In particular, methods need to be discovered by which a citizen can be given a reasonable opportunity of securing redress in the event of his being a victim of maladministration which does not infringe his legal rights. This was, of course, a matter which lay outside the terms of reference of the Committee. They point out in the Report that they were precluded from considering the great majority of cases where individual rights are affected by governmental decisions but where no formal procedure involving a tribunal or inquiry is required, although it may be thought that " the individual is less protected against unfair or wrong decisions " (para. 14). They could not, therefore, deal with the Crichel Down kind of case.

The narrow terms of reference of the Committee have been generally criticised, and Professor Robson suggests that the terms of reference of Royal Commissions and Departmental Committees should be submitted in draft form to Parliament for debate before being finally settled. It was partly for this reason that the Committee rejected, without detailed examination, the proposals made by several witnesses for a general administrative appeal tribunal or administrative division of the High Court. Professor E. C. S. Wade, writing in *The Law Quarterly Review* for October, 1957, complains that the Committee went further than they need have done in applying a restrictive interpretation to the terms of reference. Thus they excluded industrial tribunals, for instance the Industrial Court and wages councils, from consideration, although they appear to be within the terms. The disputes between trade unions and employers, however, with which these industrial tribunals mainly deal, are so entirely different in character from issues between individuals and government departments that it is fortunate the Committee were not tempted to stray into this particular field. Professor Wade would hardly have been able to congratulate them on the promptitude and clarity of their Report if they had. It is the particular merit of the Report that attention is concentrated on essential principles and practical reforms, in spite of the subject-matter being so large and involved.

As for a general remedy for acts of maladministration, Professor Wade believes that the Government deliberately excluded, in fixing the terms of reference, the possibility of an administrative appellate tribunal being among the recommendations. He goes on to say that this is not surprising, since such a proposal would constitute a revolutionary departure from the traditions of our legal system. Its advocates, one of the most distinguished of whom is Professor Robson, have failed, he thinks, to make clear how its jurisdiction could be kept apart from policy issues, and how two systems of law arising side by side could be avoided. These are not the only difficulties, nor perhaps are they so serious as Professor Wade suggests. Policy is one thing, administration another, even though it may not sometimes be easy to separate them, and an appellate tribunal might surely manage to investigate the way in which a policy was carried into effect without passing upon the merits of the policy. Again, in other countries it has not been found that the existence of two systems of law side by side need produce insuperable problems. The real trouble seems to be that an administrative court of appeal could not effectively check maladministration without delving far more deeply into administrative and governmental secrets than civil servants and politicians would readily tolerate, or, indeed, perhaps than would be practicable unless the tribunal had special investigatory methods at its disposal. In Professor Wade's view, if further remedies are required for punishing the misdeeds of officials, of which he does not appear to be wholly convinced, they must be found in the evolution of a stricter disciplinary code administered within the Civil Service, or in the extension of the criminal law. It is unlikely that any tightening of disciplinary measures within the Civil Service would satisfy members of the public who have a grievance of such a nature. The result would be merely to enable official dirty linen to be washed better in privacy.

Professors Wade and Robson are both disappointed that the Committee did not make more proposals for amalgamation of particular tribunals. But perhaps the Committee were wise in being cautious in this matter. The existing proliferation of tribunals is no doubt untidy and invites improvement, but the disadvantages of amalgamation might outweigh the advantages. In any event, this is a question which is neither very important nor very urgent, and with which the Council on Tribunals will be fitted to deal.

The most interesting and novel feature of the Report is the proposal for a standing Council on Tribunals. The main function of the Tribunal will be to suggest how the general principles of constitution, organisation and procedure enunciated in the Report should be applied in detail to the various tribunals, to keep the work of tribunals under constant review, and to give advice on any new tribunal which it is decided to create. The Government has now accepted the proposal of the Committee, with certain reservations. Thus there is to be only one Council, with a committee dealing with Scottish tribunals, instead of two separate Councils, as recommended by the Franks Committee. And the Council will not itself have the duty of appointing members of tribunals. It will be wholly an advisory body. The Committee make it clear that they envisage a regular system of administrative law, distinct from and yet subordinate to the ordinary courts. They explicitly reject (para. 40) the official view that tribunals should be regarded as part of the machinery of administration, for which the Government must retain a close responsibility. According to the view they prefer, tribunals should be regarded as machinery provided by Parliament for adjudication, independent of the executive. There is a significant difference between this view and the grudging attitude towards tribunals shown by the Donoughmore Committee in 1932.

The Committee go on, after considering general principles, to examine particular tribunals, or rather a number of the most important ones, and find little cause for complaint in them, with the exception of rent tribunals and county agricultural executive committees, in regard to which suggestions for improvement are made. They are not impressed by the absence of uniformity in matters of constitution and procedure, but they favour an appeal on the merits as a rule to a second tribunal, and also a right of appeal on points of law to the ordinary courts, except in the case of decisions by the National Insurance and Industrial Injuries Commissioner, or Deputy Commissioners, and by National Assistance Appeal Tribunals. It is only necessary to remember the lamentable history of stated cases under the Workmen's Compensation Acts to recognise why an appeal on law from the Commissioner is not recommended, and National Assistance Appeal Tribunals are in a special position. Following in this, as in other instances, the conclusions of the Donoughmore Committee, the Franks Committee are " firmly of opinion that all decisions of tribunals should be subject to review by the court on points of law " (para. 107). That is to say, all tribunals without exception should be subject to the supervisory jurisdiction of the courts, even though, as in the cases of the Commissioner and National Assistance Appeal Tribunals, there may be no appeal to the courts on points of law.

In England it appears that, if, as is recommended by the Committee, all tribunals are obliged to give full reasons for their decisions, any error of law will render the decision liable to be quashed by order of certiorari. There are certain differences between this mode of review on the one hand and an appeal on a point of law on the other hand. In particular, the court cannot look at the notes of evidence in the former case, but must find the error of law, if any, on the face of the record, for example in the "notice of decision" (para. 99) which, according to the Committee's recommendations, should be sent to the parties by the tribunal, and which should include not only the decision itself but also a statement of the findings of fact by the tribunal and the reasons for the decision. The Report observes that in Scotland there is no remedy by way of certiorari to quash a decision for an error of law on its face. It continues with the somewhat astonishing remark: "It may be, however, that no difficulties will arise in that certainly the Commissioners and probably National Assistance Appeal Tribunals, wherever they sit, are subject to the supervision of the English courts. If, however, this not so, an equivalent remedy should be provided in Scotland in these cases" (para. 110). As Professor J. D. B. Mitchell has pointed out in the April, 1958, number of this *Review* (p. 81), the proposition that the Commissioners and National Assistance Appeal Tribunals, sitting in Scotland, are subject to the jurisdiction of the English courts is irreconcilable with the express terms of the Treaty of Union of 1707. There is no better ground for the assertion of jurisdiction by an English court over a tribunal in Scotland than for a Scottish court over a tribunal in England. If the Committee are correct, why should the English courts not claim to exercise supervision over other tribunals sitting in Scotland, for example, the General or Special Commissioners of Income Tax? Let us suppose that the Special Commissioners refused to state a case for the opinion of the Court of Session, can it be suggested that an aggrieved taxpayer could apply to the English High Court for an order on the Special Commissioners to state a case?

It is difficult to understand the English practice by which the courts review decisions of inferior courts or tribunals on the ground of error of law on the face of the record, or what is the justification for making a distinction between review of this kind and appeal by stated case on a point of law. The superior court may not have access in the former instance to the notes of evidence in the case. The Committee, however, recommend that the "notice of decision" should include a statement of the findings of fact of the tribunal. It seems in that event to be a distinction without a difference, or at any rate without any difference unless a technical one. In *R.* v. *National Insurance Commissioner*[1] the question whether certiorari will issue to quash a decision of the Commissioner was raised but not answered. Commenting on this case,[2] Mr. J. A. G. Griffith says that it would be "a revolution in procedure" if the court assumed the power of reviewing decisions of the Commissioner for error of law on the face of the record. "It is essential to the working of the present procedure that the Commissioner should give reasons for his decisions. But if there is to be litigation in the courts on his interpretation, the result will be to introduce into the field of national insurance and, presumably, to re-introduce into the field of industrial injuries the costly and dilatory procedure so notorious under the Workmen's Compensation Acts which the Acts of 1946 sought to end." Nevertheless, in *R.* v. *Medical Appeal Tribunal*[3] the Court of Appeal seems, by implication, to have asserted the power of the courts to review decisions of the Commissioner on the ground of error of law.[4]

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[1] [1955] 1 Q.B. 139.

[2] 18 M.L.R., p. 59.

If the consequence of providing a remedy in Scotland equivalent to that given by the prerogative orders in England would be virtually to abolish the difference between an appeal to the courts on points of law and the exercise of the supervisory jurisdiction of the courts, we may readily agree with Professor Mitchell in hoping that no such alteration as the Committee desire will be made. The supervisory powers of the Court of Session are in fact at present ample, and to imitate English models on this subject would be the reverse of advantageous. According to Professor Mitchell, it is a fallacy to think that the courts in Scotland do not exercise the power of quashing for error of law on the face of the record. He does not, however, quote authority for the view that the Committee were mistaken in this respect, and it is thought that such a power is wholly inconsistent with the practice of the Scottish courts. Where both a general appeal and a restricted appeal on points of law are excluded, the courts in this country will not, it seems, interfere with the decision of an inferior court or tribunal on its merits, even where there has been a manifest error, whether of fact or of law.[5] On the other hand, an inferior court will be corrected where it has exceeded its jurisdiction, or failed to perform a duty, or committed a breach of a rule of natural justice.

If we turn from the illuminating note by Professor Mitchell to his equally illuminating article, "Reflections on *Law and Orders*," in the same number of this *Review*, we find that the approach of the English courts to the problem of controlling subordinate bodies is in marked contrast to that of the Scottish courts, the methods employed by the latter being less formal and rigid. Certiorari will not, for example, lie unless a judicial or quasi-judicial decision is involved, whereas in Scotland the courts do not fetter themselves by a classification of this kind but are prepared to control administrative as well as judicial proceedings where the legal rights of a subject have been infringed. On the other hand, once a decision has been classified as judicial in character, the English courts appear to be ready to quash a decision for reasons wider than the Scottish courts recognise. Thus in *Lee* v. *Showmen's Guild*[6] the Court of Appeal held that the committee of a trade union formed to protect the interests of showmen visiting fairs had acted illegally in expelling a member for acting in breach of a rule banning "unfair competition with regard to the renting, letting or taking of ground or position." In fact, no question of a breach of natural justice or of jurisdictional excess was involved, but merely a construction of the phrase " unfair competition " which in the opinion of the Court of Appeal was erroneous in law. The committee of the Guild was condemned for characterising as " unfair competition " what the judges, who were presumably less familiar with the meaning to showmen of that phrase than the committee, thought was something else. In regard to arbitral awards it is familiar law in Scotland that the courts will not interfere with them on the merits whatever errors the arbiter may make. The same rule might be expected to be applied in the case of a domestic tribunal like the committee of the guild in *Lee* v. *Showmen's Guild*, or any other inferior tribunal. The distinction between error of law, on the one hand, and excess of jurisdiction, or oppression, or failure of duty, on the other hand, is fundamental, even if not always quite clear-cut, and it would be unfortunate if the Scottish courts were to follow English courts in mixing them up.

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[3] [1957] 1 Q.B. 584.

[4] See the note on this case in 1957 *Public Law*, p. 89.

[5] See *Mitchell* v. *Cable* (1848) 10 D. 1297, *per* Lord Mackenzie at p. 1307; *Robson* v. *Menzies*, 1913 S.C.(J.) 90, *per* Lord Justice-General, at p. 95; 1913, 2 S.L.T. 90.

[6] [1952] 2 Q.B. 329.

Professors Wade, Robson and Mitchell are all dubious about the general right of appeal on a point of law proposed by the Committee, and in part at least accepted by the Government, on the ground that this may open the door to excessive litigation, particularly since the line between a question of fact and a question of law is not always easy to draw. It no doubt could happen, but there is no sense in being frightened too much by the recollection of workmen's compensation. There are already quite a number of tribunals from which an appeal by stated case to the Court of Session exists. Yet, apart from revenue cases, where nobody is likely to dispute the need for a right of appeal, the number of appeals from inferior tribunals on points of law which are reported annually is very small indeed. The advantages of giving a right of appeal in law are substantial, especially in the interests of uniformity and certainty and, perhaps most of all, because of the greater care and sense of responsibility which the possibility of appeal produces in an inferior court. No doubt there may be theoretical difficulties in distinguishing between questions of fact and questions of law, but the difference in practice between a general and a restricted appeal is well established and not open to dispute. The principle that on points of law there should invariably be preserved a right of appeal to the ordinary courts, unless very good reasons can be put forward for denying it in a particular instance, is surely a valuable one.

The second part of the Franks Report deals with public inquiries or hearings required to be held prior to a Ministerial decision. The recommendations of the Committee here are primarily concerned with inquiries in connection with the compulsory acquisition of land and with development plans. From a practical point of view they are perhaps of more immediate importance than the conclusions of the Committee relating to tribunals, in spite of their comparatively narrow scope. These recommendations have been in large part accepted by the Government and will be carried into operation without the need for legislation. Persons whose interests are affected by such inquiries will no longer, it seems, have any real grievance, so far as procedure is concerned. In particular, full information will be given to them before or at the inquiry, the commissioner's or inspector's report will be made available to them, and the formal letter conveying the

Minister's decision will give reasons and, if the commissioner's recommendation is not accepted, will state why.

These reforms will no doubt in the long run tend to limit the discretion of Ministers in coming to a decision and to throw more of the responsibility on to the inspector or commissioner before whom the inquiry is held. It seems to be a tendency in the right direction. Although issues of policy cannot be excluded entirely, it appears unnecessary and undesirable that the details of a development plan, or the question whether a particular piece of land should be required by a local authority, should be subject to the decision of a Government department. An interesting suggestion of the Committee, which has not however been accepted, is that in some planning appeals Ministers should be empowered to delegate decisions to inspectors (para. 392). It is the function of the central government to decide on matters of national concern, but not surely to interfere with local affairs so long as the broad lines of national policy are respected.

SUMMARIES

By S. G. Kermack, c.b.e., m.a., ll.b., Advocate, Sheriff-Substitute of Renfrew and Argyll at Oban

Comparative and Foreign Law

"The Idea of Legality in Western Countries," by Professor C. J. Hamson in the *Revue Internationale de Droit Comparé*, January–March, 1958, on family law, "German Law on the Equality of Men and Women," by Professor Gunther Beitzke of Göttingen; "Reform of the Condition of the Married Woman in Belgium," by Professor Claud Renard of Liége, in the same number of the *Revue*.

In *British Tax Review*, March–June, 1958: "The Taxation of Capital Gains in the United States and the United Kingdom," by Messrs. Brudno and Hollman, shows that such taxation is not the simple positive and negative decision that is sometimes imagined.

The New York University Law Review, January, 1958: Government Tort Liability, a comparative analysis, particularly as regards Germany, by Rolf Braband.

Professor Herlitz of Stockholm in *Public Law*, Spring, 1958, opens our eyes to the extent to which Swedish law solves the question of the right of the public in Sweden to get access to official documents.

Conflict of Laws

In the *Law Quarterly Review*, April, 1958, "Recognition of Foreign Nullity Decrees," by J. K. Grodecki.

In the *Modern Law Review*, March, 1958, Illegality and the Conflict of Laws, a critical consideration of the case of *Regazzoni* v. *K. L. Sethia, Ltd.*, by Mr. F. A. Mann, ll.d. (Lond.).

Constitutional and Administrative Law

Public Law and the *Journal of Administrative Law* have from Spring, 1958, arranged to amalgamate, incorporating the principles of both.

In this Spring issue, Professor Robson considers critically the Franks Report. In the same number, Mr. Leo Blair disposes of the view that the civil servant is endangered by his lack of legal right against the Crown.

The Canadian Bar Review, May, 1958, " Sovereign Immunities from the Jurisdiction of the Courts," by J. M. Hendry of Dalhousie University.

In the *British Journal of Administrative Law*, Winter, 1957, appeared an article by D. C. M. Yardley on Remedies in Administrative Law, concerning the Prerogative Writs as considered by the Franks Committee, in which a note refers to the Scottish equivalents.

Public Law, Summer, 1958: " The Supreme Court in India," by Sri Ram Sharma; " The Senate of Northern Ireland," by A. G. Donaldson.

The Modern Law Review, May, 1958: Leo Blair on The Civil Servant—a Status Relationship, complementary in some respects to his article in *Public Law* (*supra*).

CRIMINAL LAW

In the *New York University Law Review*, March, 1958, in the Annual Survey of American Law, Professor Rex A. Collings, Jr. of New York University on Criminal Law and Administration is very critical of the leniency exhibited recently by the Supreme Court.

The Canadian Bar Review, March, 1958: " The Hicklin Rule and Judicial Censorship," by R. S. Mackay, University of Toronto, first part of a discussion of the offence of obscenity.

In the *Modern Law Review*, March, 1958, and May, 1958: The Purposes of Criminal Punishment. Lectures delivered at University College by Gerald Gardiner, Q.C.

INTERNATIONAL CO-OPERATION

In the *American Bar Association Journal*, May, 1958: Professor Bradway and Mona Evans of Duke University on the Refugee Problem, discussing the legal aid that might be provided.

INTERNATIONAL LAW

In the *Connecticut Law Journal*, December, 1957, " Law in the Settlement of Disputes between Nations," by Hon. Hubert Brownell, Jr., ex-Attorney-General of the United States.

In the *American Journal of International Law*, January, 1958, " Thirty-sixth Year of the World Court," by Professor Hudson of Harvard, a series which he has sponsored every year since the court's inauguration; Professor Gross on Participation of Individuals in Advisory Proceedings before the same court; Professor Grinsburgs analyses the attempted defence in International Law by Russia of the invasion of Poland in 1929.

In the sphere of " Peaceful Co-operation " the same journal carries a study by Martin Douelle and John N. Hazard of the suggestion by the Soviet Union to bring State Trading within the Most-Favoured-Nation Clause.

The April number of the same journal: " Authority of U.N. to establish a U.N. Force," by L. B. John of Harvard Law School; " The

Initiation of Coercion," by Professors McDougal of Yale, and F. P. Feliciano, to show the ambiguity inherent in questions relating to the commencement of war; "Concession Agreements and Nationalisation," by Kenneth S. Carlston of Illinois University.

Law and Medicine

In the *American Bar Association Journal*, December, 1957, "The Legal Aspects of Artificial Insemination," by Allen D. Holloway. The same subject is discussed by G. W. Bartholemew in *Modern Law Review*, May, 1958.

Legal History

In the *Law Quarterly Review*, April, 1958, "Trespass from Henry III to Edward III," by S. F. C. Milsom, the first part on General Writs.

Scots Law

In the *Conveyancing Review*, February, 1958, Professor MacRitchie of Aberdeen reviews shortly the Enforceability of Restrictions in Title such as rent burdens, while the Editor studies the doctrine of error as illustrated in the recent case of *Anderson* v. *Lambie*.

In *Public Law*, Summer, 1958, "The Church of Scotland," by R. King Murray.

The Conveyancing Review, May, 1958: Professor Henry deals with the Dilatory Bondholder and discusses the plea of *non valens agere* in this connection; Mr. J. R. Scott on acquiescence in connection with building conditions.

Supranational Law

In the *British Tax Review*, March, 1958, Mr. W. B. Reddaway considers the Implications of a Free Trade Area for taxation from the British point of view.

Periodicals also received: *La Justícia* (Mexico), *Oklahoma Law Review*, *The Western Political Quarterly*, *Jus* (Milan), *Revista Del Foro* (Lima), *The Canadian Bar Journal*, *Documentation Juridique Étrangère* (Brussels), *Textes Législatifs Étrangers* (Brussels), *Indian Law Quarterly Review*.

RECENT LITERATURE

Dicey's Conflict of Laws. By J. H. C. Morris, D.C.L., with specialist editors. Seventh edition. 1958. London: Stevens & Sons, Ltd. Price £6 6s. net.

The immediately apparent changes in the latest edition of *Dicey* are changes of form. Dr. Morris has abandoned the familiar tripartite division of the book into sections dealing respectively with the jurisdiction of the High Court, the jurisdiction of foreign courts, and questions of choice of law. Dicey's arrangement, while apparently logical, often compelled the reader to consult widely separated parts of the book for information about problems which in practice were invariably connected. The new arrangement follows that adopted by most other writers. The chapters are grouped into seven parts dealing respectively with preliminary matters, jurisdiction, persons, property, obligations, foreign judgments and procedure. The change greatly simplifies the use of the book. Another alteration in form is the omission of the equally familiar table of principles and rules. What purpose this table was designed to serve has never been very clear and its omission will occasion no regrets.

Despite the omission of the table of principles the book is extremely long, the work being almost a third as long again as the previous edition. It can no longer be described, as Dicey described it, as a "Digest of the law of England with reference to the Conflict of Laws." Its 1116 pages of text make it assume the character of a work of reference. The length of the book is to be explained partly by the rapid development of this branch of the law and partly by the fuller treatment given to many subjects such as proof of foreign law, corporations, the effect of marriage upon property, and foreign arbitration awards. The editors clearly aim at comprehensiveness and the reviewer can think of little of moment which is not discussed. There appears, it is true, to be no discussion of the methods of obtaining evidence outwith the jurisdiction either by statutory or by common law procedures, but this may have been deemed to be a matter outwith the scope of the book.

In a book of this length devoted to a developing and controversial branch of the law, the reader will find several propositions whose accuracy he doubts and a few which he would wish to challenge. That is particularly true of the Scots lawyer who is brought up in a system whose basic assumptions may differ from those of the English system, and which is not always fettered by the same authorities. *Shaw* v. *Gould* (1868) L.R. 3 H.L. 55, for example, is not binding upon the Scottish courts and the Scots lawyer will tend to be impatient with the patient way in which Dr. Morris tries to weave that case into the tapestry of the modern law. The decision in *Re Bischoffsheim* [1948] Ch. 79 appeals to the reviewer in much the same way as it would doubtless have appealed to Lord Deas.* Dr. Morris has now qualified the extreme position which he adopted in his *Cases on Private International Law* with reference to legitimacy, but he still finds evident difficulty in appreciating—to paraphrase a remark of the Judicial Committee in *Khoo Hooi Leong* v. *Khoo Hean Kwee* [1926] A.C. 529, 543—that it is a possible jural conception that a child may be legitimate though its parents were not and could not be legitimately married. Again, the bald statement on page 54 that Scottish " statutes of limitation " relate to procedure and not to substance is unsupported by the case upon which it is founded, *Don* v. *Lippmann* (1837) 2 Sh. & Macl. 682, is scarcely consistent with the analysis of the question on page 1092, and certainly not consistent with the lucid exposition of the law given by the Court of Session in *Higgins* v. *Ewing's Trs.*, 1925 S.C. 440; S.L.T. 329. But there would be no end to detailed criticism of this kind as to which, in any case, there is room for more than one point of view. The outstanding feature of the book is the balanced way in which opposing points of view are presented upon the questions discussed, and the honest and unequivocal way in which each writer's own opinions are expressed.

Dr. Morris does not appear to have repeated his previous cautionary remark that " Scottish decisions are only adduced in cases where there is identity of statutory law or the legal principles involved are substantially the same " (6th ed., p. 11), but it seems likely that the same principle has been followed. The use, however, which the editors make of Scottish authorities is extremely haphazard. While Outer House decisions are not infrequently cited, several decisions of the House of Lords in Scottish appeals are entirely neglected, or neglected in apposite contexts. In other cases decisions which are no longer law in Scotland are cited. The reviewer, however, does not insist upon this point, since the book, although much used in Scotland, is essentially a textbook of the Private International Law of England. Judged as such, it is of superlative quality.

A. E. ANTON.

The Vinerian Chair and Legal Education. By Harold Greville Hanbury, D.C.L., Eleventh Vinerian Professor of English Law in the University of Oxford. 1958. Oxford: Basil Blackwell. Price 35s. net.

1958 is the bicentenary of the foundation of the Vinerian Chair of English Law in Oxford, the oldest Chair of English Law in the world. The Regius Chair of Civil Law is older, having been founded by Henry VIII, but, as elsewhere, the study of the municipal law came only later. Professor Hanbury has taken this occasion not merely to celebrate the fact as an act of piety but to portray his ten predecessors, evaluate their achievements in the Chair, and present thereby a picture of Oxford legal scholarship over two centuries. The study differs from such a work as Goebel's *History of the School of Law, Columbia University*, in being more personal and informal, less concerned with academic policy and struggles and the rise of a school than with men, their personalities, and their works. The learned author has not tried to produce a general history of the Oxford Law School though this book most tantalisingly whets the appetite for such a work.

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* *Fenton* v. *Livingstone* (1861) 23 D. 366, 381 and *Beattie* v. *Beattie* (1866) 5 M. 181, 190.

The Chair was founded under the will of Viner, author of the *Abridgment*, and the first incumbent was William Blackstone, who had five years before begun privately to deliver the first course of lectures on English Law. Eleven years later the famous *Commentaries* appeared, based on the lectures, a work of tremendous importance for the future development of the common law on both sides of the Atlantic, and the model of Stephen's, Kent's, Story's and other books, the beginning, at least in England, of the analytically arranged text-book. Blackstone held the Chair only till 1766 and, as often at that period, his immediate successors were not without merit or ability but contributed little to legal scholarship or education.

The great period of the Vinerian Chair, however, began in 1882 with the election of Dicey, whose *Law of the Constitution*, *Conflict of Laws*, and *Law and Public Opinion* are still, and are likely to remain, classics. The learned author paints a most attractive picture of Dicey and, in his discriminating appraisal of Dicey's works and their influence, does not overlook his collaboration with Rait in *Thoughts on the Union*, a book not sufficiently appreciated today, wherein was accepted the view that the Union of 1707 was a contract and that the post–1707 Parliament had no power to overturn essential conditions of the Union, a fact which Dicey himself elsewhere overlooked and which Parliament has conveniently ignored. Dicey was succeeded by Geldart, whose principal interests lay in industrial law, and Geldart was succeeded by Holdsworth, whose *History of English Law*, about to be completed by posthumous fourteenth and fifteenth volumes, is undoubtedly the greatest work of legal scholarship of this century and one which stands with Blackstone's *Commentaries* in authority and influence. To Holdsworth succeeded Cheshire, whose greatest work has been in Private International Law, Real Property and Contract, and the present incumbent, whose work has been mainly in Equity. To have had Blackstone, Dicey and Holdsworth is itself a fair achievement, and the record of the Chair has never, even in the eighteenth century, fallen below a respectable standard, while the last eighty years have been brilliant.

In each case the learned author sketches the professor's life and discusses his writings carefully and in some detail, in relation to the law and legal movements of the time, which does much to enable one to assess the permanent value of the man's work. It is possibly a pity that there is not rather more reference to the academic background, to the contemporaries of the successive professors in the other major disciplines to show how law and law teachers stood among the other men of the time. But nevertheless there is presented a well-balanced picture of each, one which in the cases particularly of Dicey and Holdsworth is drawn with personal knowledge, respect and affection.

The last chapter contains some all too brief but most interesting observations on Oxford legal education in general which show how much more than in the Scottish Universities law has an honourable place as an academic discipline, and that not only for men entering the legal profession. "Can it be said (pp. 243–244) that the two practising branches of the profession continue to view [the academic study of law] with contempt, or, at the best, with amused tolerance, or do they tend now to realise its true value? Possibly a different answer should be given, as to the relations of teachers of law with solicitors, and with Bench and Bar. Here and there are to be found solicitors who consider that all an articled clerk needs to learn, apart from the subjects for his statutory examinations, is the management of the office, but the majority have probably become convinced that a successful solicitor must have a wide knowledge, not only of the technical minutiae of the law, but of its inner meaning, which is bound up with that understanding of human nature and human society which only systematic training in fundamental principles can impart." If only this were true of Scotland, both for solicitors and apprentices!

The book is unfortunately disfigured by too many trivial printing slips. Also Westlake (p. 109) ran into seven editions, not five, the last two being in 1922 and 1925.

This is a pleasant, personal, entertaining and profoundly interesting book, very valuable for a just appraisal of the men and their work, and important for the study of English legal literature and education, and the eleventh professor deserves credit and our thanks for his very worthy tribute to his predecessors.

David M. Walker.

Trade Union Law and Practice. By Horatio Vester, Barrister-at-Law, and Anthony H. Gardner, Solicitor of the Supreme Court. 1958. London: Sweet & Maxwell, Ltd. Price 35s. net.

This is a useful book. It is not designed to replace the fuller consideration of the subject in Mr. Norman Citrine's standard work on *Trade Union Law*, to the merits of which the authors pay tribute in their preface. They have, however, achieved the commendable object of setting out the whole law relative to trade unions in less than two hundred pages of text. Within that compass the book deals concisely but adequately with every aspect of its subject—both the wider concepts such as the law of conspiracy and the more particularised questions of everyday trade unionism such as the rights of members and the exercise of disciplinary powers. There is an exceptionally full citation of authority, including the more important Scots cases, though it is a pity that the proper Scots citation seldom appears in the footnote—for *Martin* v. *Scottish Transport & General Workers Union* the reference is to the *All England* series of reports, while for *Wilson* v. *Renton*, for some unknown reason, the reference given in the text is to *The Scottish Law Reporter*, though the case is reported in the Justiciary reports as well as in *Session Cases* and in Vol. 1 of *The Scots Law Times*. The book does not of course profess to be other than a textbook of English law; and such sections as that on execution of judgments have no reference to the position in Scotland. But in a region in which Scots law has few specialties and in which there is no up-to-date Scottish textbook the publication of this book successfully meets a real need of the legal profession in Scotland as elsewhere.

The book provides a ready and accurate answer to problems that are constantly cropping up in practice in these days when trade unions play such a leading part in the life of so many people—" trade unions," as we are usefully reminded, including not merely the combinations of employees to which the name is popularly applied but also many different varieties of trade association formed for such purposes as restricting competition and maintaining prices, about one hundred of which are registered as trade unions. The text is supplemented by appendices bringing together the relevant statutes in a convenient form so as to enable the practitioner to ascertain at once what are the provisions now in force.

G. S.

Law in the Making. Sixth Edition. By Sir Carleton Kemp Allen, Q.C., D.C.L. 1958. London: Oxford University Press. Price 50s. net.

Allen's *Law in the Making* has in the course of thirty years firmly established itself as a standard book on the important and interesting branch of jurisprudence usually known as " sources of law," and it is too familiar to require detailed review. It is now an accepted classic, not only because it is erudite but because it is pleasant and entertaining reading; and the reading of the latest edition has all the pleasure of meeting again an old and good friend who is looking rejuvenated and refreshed.

The new edition shows no fundamental changes but the process of revising certain passages and bringing the text up to date has been continued. All the developments since the last edition have been taken account of; the Report of the Franks Committee is noted in an appendix; the important results of *Glasgow Corporation* v. *Central Land Board* (1956 S.C.(H.L.) 1, S.L.T. 41) have caused some clarification of the discussion of the authority of House of Lords judgments; it is, however, slightly surprising to find no mention of *McCormick* v. *Lord Advocate* (1953 S.C. 396, S.L.T. 255) and the resultant literature in relation to the right of Parliament to bind itself for the future. On p. 217, however, the statement still stands that the practice of consulting the judges in House of Lords appeals died after *Allen* v. *Flood* ([1898] A.C. 1) whereas there is evidence (Andorsen's *Memoirs of Lord Salvesen*, pp. 66–67) that it lasted until 1904: *Free Church* v. *Lord Overtoun* ([1904] A.C. 515). On one other point Sir Carleton is possibly rather less than fair to the reports; he states that *McLean* v. *Bell* may be found " only in 147 L.T. 262," but since the case was a Scottish one the English reporters may perhaps more readily be forgiven for failing to appreciate the importance of the decision (on contributory negligence), and the case is in fact fully reported in 1932 S.C.(H.L.) 21 and 1932 S.L.T. 286.

While the author modestly indicates his constant surprise that his book has retained its vitality for so long, that is not in fact at all surprising when there is so much learning so attractively presented and so ably brought up to date. This new edition will maintain the life and classic status of the book for a good few years yet, and will, we hope, not be the last from the author's felicitous pen.

David M. Walker.

Historic Decisions of the Supreme Court. Selected by Carl Brent Swisher, Stran Professor of Political Science, Johns Hopkins University. Anvil Books, No. 29. 1958. London: D. Van Nostrand Company Inc. Price 8s. 6d. net.

In this book the learned editor has been remarkably successful in gathering inside 190 pages the pith and marrow of thirty-three leading decisions of the Supreme Court. Each case is represented by a brief note giving the essential facts and showing how the case came to be before the Supreme Court, pointing out why the case is important and, sometimes, what extra-legal factors influenced the judgment. Of course in the space available the judgments have had to be ruthlessly cut and there is space usually only for the main passages from the leading judgment and as a rule the minority judgments have had to be excluded altogether. Nevertheless, at this cost of severe condensation and censorship of dissent, there is a remarkable amount of valuable Supreme Court law collected here.

The period covered is from the beginnings of the Republic until the present, starting with *Marbury* v. *Madison* in 1803 wherein Marshall first asserted the doctrine of judicial review of the constitutionality of legislation and ending with *Watkins* v. *United States* in 1957 wherein the court protected an individual who had declined to answer questions before the Committee on Un-American Activities. In between there are excerpts from cases as well known here as in America, such as *McCulloch* v. *Maryland*, *Dred Scott* v. *Sandford*, a landmark in the movement which ended in the War between the States, *Lochner* v. *New York* and *Adkins* v. *Children's Hospital* which are notorious specimens of the philosophy of the Supreme Court at different periods, and so on down to *Brown* v. *Board of Education of Topeka* wherein the Supreme Court spoke clearly against negro segregation.

While this collection necessarily has the faults attendant on any work of its scale it is a very useful little book and could well prove of considerable aid to students in this country of the American Constitution, the Supreme Court or American history, for whom the standard case-books are too large and full, as well as too expensive.

David M. Walker.

The Definition of Law. By the late Hermann Kantorowicz. Edited by A. H. Campbell, Regius Professor of Public Law in the University of Edinburgh. With an Introduction by A. L. Goodhart, Master of University College, Oxford. 1958. Cambridge: The University Press. Price 15s. net.

A very regrettable casualty of the Second World War was the *Oxford History of Legal Science*, a comprehensive co-operative enterprise in three volumes projected in 1938, of which Kantorowicz was the chief designer and moving spirit. The war and then Kantorowicz's death in 1940 caused the abandonment of the project but some of the work done for the *History* has found its way into print in other forms, the most notable fragment having been worked up into Schulz's *History of Roman Legal Science*. We are now grateful to the editor and the Cambridge Press for rescuing and publishing Kantorowicz's essay on the definition of law, which was written as the first part of the introduction to the *History*.

The publication deserves to be welcomed for several reasons; it is valuable to have available in print the mature views of a jurist and legal scholar of the calibre and encyclopedic scope of learning of Kantorowicz, who had pondered long and deeply on what is one of the central problems of jurisprudence; secondly, this essay proves to be a most stimulating discussion which deserves and well repays study; and, not least, this is an early example of the linguistic approach to the problem, in which the criterion of the answer offered is the coherence and utility of the definition, having regard to the purpose in mind when it was formulated, rather than its consonance with *a priori* assumptions or hypotheses.

Kantorowicz's definition was in these circumstances necessarily formulated with reference to the scope and purpose of the *History*, that is, to delimit a branch of knowledge which could be comprehensively described and studied historically under the name of "legal science," not covering every kind of rule of social conduct yet not exclusive of anything which is commonly regarded as "law." The definition had accordingly to be wide enough to include ancient and primitive law, international law, the conventions of the constitution and the other topics which fit awkwardly, if at all, into the familiar formulations of the positivists with their insistence on the concepts of State, command and sanction.

The definition which Kantorowicz finally adopts is "a body of social rules prescribing external conduct and considered justiciable," which reflection suggests is eminently satisfactory. The major part of this essay consists of the working out of this definition and the examination of the elements composing it, showing that the rules are prescriptions for human conduct in organised society, which take shape externally unlike the prescriptions of morality, that they are of social origin like various other kinds of rules, and that they are justiciable (which is different from enforceable) in that they are such as can be applied by a judicial person or body under definite procedure.

This is a very thoughtful and penetrating essay which deserves the careful attention of jurists and all who have co-operated in having it published deserve thanks and commendation. It makes us appreciate, however, what a great loss it has been that we have never had the projected *History*; is it too much to hope that the idea may be revived, for there is still too much attention to what Kantorowicz would call dogmatic law and not enough to the theory and the wider aspects of law?

DAVID M. WALKER.

The Constitutional Law of Great Britain and the Commonwealth. Second Edition. By Professor O. Hood Phillips, M.A., B.C.L. 1957. London: Sweet & Maxwell, Ltd. Price 45s. net.

In its first edition Professor Hood Phillips' *Constitutional Law* established itself as a remarkably readable and comprehensive textbook. In the second edition its reputation is well maintained. This edition has been brought up to date as far as possible; an Appendix summarises the Franks Report, and throughout pending legislation has been noted so that the student is warned of the places where change is imminent. The edition is however not one which merely brings the text up to date. There has been a substantial amount of rewriting and rearrangement and alterations in the balance of treatment. In particular, the chapters on Parliamentary Privilege and on the Cabinet are examples of the happy results of this process. That on the Sovereignty of Parliament was a chapter where such treatment had also become necessary. Here full account has been taken of the South African litigation, involving the " entrenched classes," and of *McCormick* v. *Lord Advocate* (1953 S.C. 396, S.L.T. 255). On the latter case it is possible that Lord Cooper's disclaimer of any power of judicial review is overstated, but it is welcome to find insistence on the proposition that the doctrine of the Sovereignty of Parliament, as we know it, is a post–Union development. The author's precise conclusions from that proposition are not perhaps made as specific as they might be. This however is only one branch of the new treatment of the topic, throughout which the student should find plenty of stimulus, and here, as elsewhere, he will find abundant references to periodical literature and other material.

The merits of the book are, too, very noticeable in the final part, on the Commonwealth. To achieve the degree of compression which was necessary to get the material here given into just over two hundred pages without making these chapters collections of bits and pieces of fact is a feat which will earn the gratitude of many—not merely students. In that survey there is included " Colonial " material, and general accounts of the newest Member States as well as the more detailed treatment of the constitutions of the old Members. The rapidity of change in the Commonwealth makes this part as welcome as it must have made its preparation difficult.

Yet, without taking away from that welcome, there are matters which might be reconsidered. One great advantage of the book is that it does not treat the constitution as " dead " material laid out to view. The working of constitutional machinery is shown. This combined with the liveliness of the writing inevitably brings its difficulties and some statements are made, not necessarily on law but which colour legal views, which at least merit further argument. It is by no means certain that our constitution is, or indeed that any constitution can be, based on the theory that " the power of government shall be exercised in accordance with the popular will," which will " must be ascertained from those best qualified to know it, namely, the elected representatives of the people " (p. 68). That assertion, upon which is based the convention that Parliament must be summoned annually, implies a whole series of propositions many of which might not be generally accepted. The same is true of the plain assertion (p. 139) that " the prestige of the House of Lords was considerably raised in 1948 when they rejected the provision in the Criminal Justice Bill to suspend the death penalty." One's view on the prestige issue perhaps depends on one's view of that penalty. On other occasions the dispute might be between the realities in fact and appearances in law. Recent facts, such as those in relation to the purchase of aircraft or others disclosed by Select Committees, do not perhaps really bear out the statement that " Industrial and Commercial Corporations are independent in the conduct of their business and subject only to remote Ministerial control," though that statement might be justified on one reading of the relevant statutes.

The range of the book also raises problems of size. Already it is just over eight hundred pages. It may be that it will grow into two volumes, one domestic, the other Commonwealth, and the difficulty be solved. In its present form, the reader has doubts whether the right balance has always been struck on both the treatment of subject-matter, and the subject-matter which is included: on the one hand the treatment of the function and organisation of the central government departments may be too detailed; on the other hand some matter, for example in the chapter on legal liability, might be left to books on administrative law. At present there is a danger that the student may be overwhelmed and thus fail to gain all that he could from the discussion of principle here upon which his attention should be fixed.

To end on a critical note would be ungenerous. The very substantial virtues of the book should be re-emphasised. Perhaps it is only because it is a book which makes one read it with care that one finds material for criticism.

J. D. B. MITCHELL.

Aspects of Justice. By Sir Carleton Kemp Allen, Q.C. 1958. London: Stevens & Sons, Ltd. Price 25s. net.

This volume conveniently brings together a number of papers and lectures, some reprinted and some new, but most of which have not previously been conveniently available. The collection takes its title from five papers on aspects of justice, of which three were lectures delivered at Bristol and one appeared in 1947 in the volume of *Essays* presented to Roscoe Pound. Then follow three on cruelty (to animals, to children, and in matrimonial connections) of which the last has already appeared in 73 L.Q.R. 316, the paper on " The Conscience of Counsel " from the same journal, and lastly, " The Literature of the Law," a non-professional lecture delivered before the Royal Society of Literature.

The five papers on Justice, which together account for half of the book, discuss with the author's customary felicity and learning various facets of that topic of perennial interest and constant difficulty, its relation to mercy, the divergence between justice and legal justice, and the interrelations of justice with expediency and liberty. While there do not seem to be any startling new propositions put forward in the discussion it is a fresh and thoughtful presentation of views on a very fundamental theme with apt quotations and appropriate illustrations.

Of the papers on cruelty the first two are brief and contain little of substance, but the third comprises a careful examination of the elements which judicial interpretation has imported into the concept of cruelty in English matrimonial law. Particularly important are the sections on motive and intention, and the problem whether the cruelty must be " aimed at " the innocent spouse, and this discussion can be commended to Scottish readers even though not everything therein is equally applicable to Scots law.

To those who have not already read it " The Conscience of Counsel " can be highly recommended as a legal " thriller," a most amazing and fascinating tale leading up to a discussion of that difficult problem of legal ethics, the defence of a prisoner known to be guilty.

" The Literature of the Law " was an address in which Sir Carleton dealt generally, pleasantly and lightly with legal literature, the statutes, Glanvill, Bracton, Littleton, Coke and Blackstone, Hale, Fortescue, Maitland and some others culled from the great mass of printed English prose which is familiar (at least in parts) to lawyers though less so to laymen. There is naturally nothing in this which is unknown to any educated lawyer but it is to be hoped that there was something new for the audience; they could hardly have had it more pleasantly expounded to them.

The wisdom of reprinting papers and addresses is not always beyond doubt and when so much of this collection is fairly readily available elsewhere it rather looks as if the publishers have been chiefly concerned to fill out a volume and one really wonders if what has not previously been published really required publication. One last point: despite comments in a Scottish review of the second edition of *Law and Orders* Sir Carleton is still shown on the title page as Hon. D.C.L. (Glasgow), which of course, should be Hon.LL.D. The Oxford Press has been more careful in *Law in the Making*.

David M. Walker.

The French Legal System. An Introduction to Civil Law Systems. By René David and Henry P. de Vries. 1958. New York: Oceana Publications, Ltd. Price U.S. $5.00 cloth.

This book should achieve extremely well what it is designed to accomplish: the introduction of the Anglo-American lawyer to continental habits of legal thinking. Only the French system is considered, the assumption being that the lawyer who is at home in that system will find few barriers, other than that of language, to the understanding of the many systems related to that of France. The authors' approach stands in contrast to that of Amos and Walton in their *Introduction to French Law*. No attempt is made in *The French Legal System* to summarise the substance of the law. The purpose is rather to assist the reader to picture the French judicial organisation, to recognise the broad divisions into which the substantive law is classified, and to understand the legal techniques appropriate to each of these divisions. Professors David and de Vries are content to orient the reader by sketching in the broadest of outlines, leaving it to the reader himself to fill in the detail of the canvas by making use of the extensive bibliographies. These are admirable, but readers in this country will be tantalised by the frequent reference to obscure American legal journals. While the authors carry economy to an extreme in dealing with the French Criminal Law in three pages of text and the *Droit Civil* in a mere two, the reader is left with the impression that, on the whole, the book is well balanced. Professors David and de Vries are at their best when dealing with French methods of formulating rules of law, with the sources of these rules, and the ways in which the courts apply or refuse to apply them. The book will present a special interest to Scots lawyers, whose own system has been so deeply influenced by that of France. They will find that, by lifting barriers of mutual misunderstanding, the book helps them to know better and better understand their old friends and neighbours, the French.

A. E. Anton.

A History of English Criminal Law and its Administration. By Leon Radzinowicz. Vol. 2, The Enforcement of the Law; Vol. 3, Reform of the Police. 1956. London: Stevens & Sons, Ltd. Price £4 4s. each volume.

Dr. Radzinowicz's monumental labours on the *History of the English Criminal Law* produced the first volume in 1949, " The Movement for Reform," dissecting the savage and capricious administration of criminal justice in England, and tracing the various movements for its reform. In the present two volumes under review he deals exhaustively with two subjects related to each other—" Enforcement of the Law " and " Reform of the Police." As in the case of Gibbon, Mommsen and Savigny, Dr. Radzinowicz, by the range of his research and by his tremendous industry, strikes the author of few and meagre works with a sense of guilty awe. Moreover, these great volumes—great in scholarship and bulk alike—are fascinating to read. Associated with Dr. Radzinowicz in his triumphs, it is fitting to thank also those in the Department of Criminal Science in the University of Cambridge and of the Pilgrim Trust, who made the enterprise possible.

The second volume on " Enforcement of the Law " describes the haphazard, misdirected and ineffective machinery for dealing with offenders against the criminal law during the seventeenth–nineteenth centuries. Parliament might legislate regarding crimes and menace criminals with the direst punishments, but unless the lawbreaker were detected, arrested and prosecuted to conviction, the statutory menace was a *brutum fulmen*. To this day, with our highly organised system for prevention, detection and prosecution of crime, there remains a substantial " dark figure " of crimes that are never detected. Until the emergence of modern police forces and methods in Britain the percentage of undetected crime was vastly greater. In England, from the seventeenth century until Peel's Police Act of 1829, prevention and prosecution of crime were among the gravest of all social problems. The decentralised methods of antiquity and of a static rural society, whereby the community policed itself, had long outlived their effectiveness; and the expedients invoked to supplement their inefficiency were all too often the source of fresh abuses. The learned author deals in detail with the various incentives offered to encourage enforcement of the law, in particular with the general reliance on the paid informer, who so often combined his infamous traffic with the rôle of *agent-provocateur*. The supreme authority of the State, local authorities, and private citizens alike offered general inducements and rewards to further the enforcement of the criminal law, while those officially engaged for this purpose—in the main a corrupt and ineffective brotherhood—were miserably remunerated. These, not excluding the celebrated Bow Street Runners, looked to special rewards or bribes for securing convictions as their real source of income. Moreover thief, fence, receiver, and even the ostensible custodiers of law and order, frequently joined in or connived at the division of the spoils of theft; while the price of recovering stolen property for the owner frequently comprised an undertaking against the asking of questions or the prosecution of the thief. To secure effective prosecution of suspects, bodies like the Society for the Reformation of Manners appointed and paid their own agents. Moreover, many of those who hoped for curtailment of crime through moral regeneration concluded that prostitution, tippling and Sabbath breaking (especially on the part of the poor) lay at the root of the general increase in crime. Many ingenious plans were recommended to meet problems still in 1957 confronting the drafters of the Wolfenden Report, especially the " Street-walking Strumpets "—while others anticipated the problems of National Service by recommending that " the Choice of Men for Recruits might fall wholly upon idle, disorderly persons, of whom there are more than enough in the whole Kingdom." The background to the inspiration of Hogarth and Dickens, and the low life of London, is discussed and documented in detail—gin shops, bawdy houses, and so forth. " Flash-houses " abounded, and were the resort of thieves, prostitutes, passers of bad money, and so forth—often of tender years. The authorities in effect connived at the continuance of these resorts, because, when infiltrated by spies, they could be a helpful source of information on the underworld.

Enforcement of the law could not be effective without a responsible professional police force. The steps and setbacks on the way to that goal are carefully traced. To a considerable extent this theme is shared by the second and third volumes—but, though there is some overlapping, there are differences of emphasis and approach. The familiar word " police " had at first an abhorrent and foreign sound to English ears, and Dr. Johnson stressed its French origin. In Scotland the word was much longer in familiar use (as the learned author notes) though not necessarily in its modern sense. Thus Kames included under the heading " police " the sale of bread, the closing of taverns, employment of the poor, providing necessities of life in times of dearth, and so forth, while " public police " might require a highway to be carried through a private estate. Adam Smith defined " police " as " the second general division of jurisprudence . . . the regulation of the inferior part of government, *viz.*: cleanliness, security or cheapness or plenty." Moreover, soon after the Union of 1707 seven Commissioners were appointed by Queen Anne for the general administration of Scotland—the Lords of Police. (One might regret that this designation has passed into oblivion, though today our "Constables" may be exalted and inactive or alternatively unassuming and effective.)

Even the manifest inefficiency of the available machinery to enforce the law, and the dangers and inconveniences this involved for law-abiding citizens, had to be long endured before the logical solution could be tolerated by those who ruled English public opinion. A strong professional police force seemed a direct threat to individual liberty and local automony.

Among the notable pioneers of police reform, the author gives full and proper credit to the aspirations and achievements of such men as Henry and John Fielding and Patrick Colquhoun (all of whom were stipendiary magistrates in London) who combined by virtue of their offices the dual function of "minor judges" and "heads or directors of the police"—being indeed designated "police magistrates." As Radzinowicz rightly observes, "When Henry Fielding was appointed a Justice of the Peace for Westminster in December, 1748, the standing of a Metropolitan magistrate was very low, and was to sink even lower still in succeeding years." The Middlesex magistracy was corrupt and of ill repute—and, as was generally accepted, used the office of magistrate as a source of income. By contrast Henry Fielding (and his brother, John), who received a secret salary paid by the Government, had a very different concept of their duty. Both Fieldings played a vital part in laying the foundations of a proper system of police. Bow Street was invested by them with a new dignity. The ramifications of their activities were very extensive, and they did not intend that their duties as Justices should be purely judicial. Thus they provided a means of co-operation between the public and those who enforced the law, by circulating printed information regarding the identities and *modus operandi* of known criminals, and by inviting information regarding specific crimes. John Fielding clearly perceived the need to secure by swift and efficient pursuit the apprehension of criminals whose movements had been traced by reliable intelligence, and the first semblance of a regular body of "thief takers" was created by Henry Fielding in 1750, a force which by 1758 had come to be well known as the Bow Street Runners.

The influence of Patrick Colquhoun on the development of a regular and efficient police force is of particular interest to the Scottish reader. When in 1792 he applied for the office of stipendiary magistrate in London, he had already achieved such success in trade and in municipal reform that ten years earlier, at the age of thirty-seven, he had been elected Lord Provost of Glasgow. Founder of the Glasgow Chamber of Commerce, Colquhoun had done so much to deserve the thanks of that city that the honorific style of "Father of Glasgow" had been officially conferred upon him. Yet it is on his record as a London magistrate and as a writer on problems of crime and of police methods that his reputation rests. These writings had great influence on his contemporaries. The Marine Police (established 1798) was not perhaps Colquhoun's own invention, though his son claimed the honour for him; but, at all events, this force which policed the River Thames (at first as a private venture but eventually under statutory authority) owed much to the planning and direction of Colquhoun. This force was to become the model on which future reformers built in securing an effective organisation of preventive police.

Though the Dublin Police Act, 1786, recognised the desirability of a strong professional force independent of the traditional control of the justices, an equivalent English measure for the Metropolis foundered in 1785. Peel had experience of the Dublin force when he served as Chief Secretary in Ireland, and in due course Peel's Metropolitan Police Act, 1829, may be traced to that experience—though Peel himself never acknowledged the value of the pioneer work done by others in matters of preventive police.

Today the foreign visitor to London might be thought somewhat remiss if he failed to comment " Your police are marvellous "; but in 1811, the predominant English attitude gloried in the fact that there was no regular police force for the capital. As Monsieur Rubichon, after visiting London, observed in that year (quoted iii, 374): " As far as I can see the glory of having no police appears to be easier to acquire than the glory of founding a good one." Dr. Radzinowicz has given an excellent analysis of the philosophical background to the prolonged opposition in and outside Parliament to the idea of a regular police force—which was distrusted as a threat to individual liberty. Adam Smith and Paley were weighty authorities on this question. Adam Smith's criminology, like his attitude to preventive police, was, however, somewhat questionable. He held *inter alia* (iii, 422) that the reason why there were fewer capital crimes in Glasgow than in Edinburgh was that the Glaswegians had fewer servants, and capital crimes were most prevalent where substantial numbers of common people were dependent on the wealthier classes. Capital crimes have, however, not disappeared with the flunkeys.

These admirable volumes were a pleasure to read, and their successors are awaited with keen anticipation. The series is dedicated to the memory of a great Scotsman, Lord Macmillan, who was formerly Chairman of the Pilgrim Trust. One day perhaps the Scottish criminal law will find its Radzinowicz. Meanwhile, the Scottish lawyer will find a good number of interesting references to Scottish affairs in Dr. Radzinowicz's *History of English Criminal Law*—though as a minor criticism it may be observed that the attention given to London is perhaps disproportionate, and one would welcome more information about conditions outside the Metropolis.

T. B. Smith.

The Civil Law System: Cases and Materials for the Comparative Study of Law. By Arthur T. von Mehren. 1957. New York: Prentice-Hall, Inc. Price U.S. $11.00 net.

The collection of " cases and materials," *i.e.*, extracts from statutes, judgments, academic and other writings, supplemented by notes, questions and problems devised by the compiler to bring out points contained in the basic matter—in a word, a mass of the raw materials of study of a given topic—is now the standard companion and basis of the studies of the American law student, whose instruction is dominated by the case method of teaching. The present handsome and imposing volume is a notable addition to the ranks of American casebooks; but is also a valuable work for the student of comparative law in the British Isles. For, though case teaching may be in its infancy in the United Kingdom, a besetting problem of any attempt to initiate comparative studies of legal problems (and is there a British law school at present not concerned to do so?) is the necessity of a reasonable modicum of materials with which to conduct a course of study. If its comparatively high price is not allowed to be a deterrent, this volume goes far to answer the need.

The selection of the contents of a casebook and the determination of its " slant "—in which connection the compiler's notes, comments, questions, etc., are inevitably of crucial importance—do more than sufficient to justify reference to the " author " of such a work. The author of this book, Professor von Mehren of Harvard, has foreseen, and taken steps to avoid, those dangers so common to comparative legal studies—domination by the differences of the sources of law in the different legal systems and the mere assemblage of information on the rules and principles of different systems for given legal issues and problems. His work is designed to give the student the means, not only of appreciating the differences of method between continental and Anglo-American legal approaches to certain topics, but also—and more important—of perceiving the conceptual bases of continental legal systems.

Hence, its five broad subdivisions, rightly called books, are: Book I, The Codes and their Background, which contains historical introductions to the building of the French and German Codes, the technique, etc., of the use of the civil codes, and the courts which administer them; Book II, Some Aspects of French Public Law, treats of the institutional structure of French government, the separation of powers as conceived in France, and French administrative law as developed in the *Conseil d'Etat*. With this, as it were, conceptual background, the way is clear for Book III, Delictual Obligations, to consider, first and generally, the principles of delict in French and German law and the common law of torts, followed by chapters on the French and German reactions to the industrial revolution and mechanised transport, in the light whereof, and of American law, a comparative analysis of the legal treatment of automobile accidents is undertaken. Book IV deals even more comprehensively with jurisprudential and practical questions of contract in French, German and American law—the formation of contract, formal requirements, the determination and consequences of default in contractual obligations. In view of the wealth of material provided by way of background in Books I and II and, in substantive issues and judgments, in Books III and IV, Book V appropriately rounds out the volume with a comparative analysis of the judicial process in the common law and continental systems.

It will be seen that the continental selection is from French and German law and that throughout, where apposite, there is reference to American (or common law generally) parallels. This is mentioned because, while French and German law are rightly regarded as the main sub-streams of continental legal experience, the author himself laments his inability, through considerations of space, to draw on Swiss materials. It is respectfully suggested that room might have been found, first by cutting considerably the over-ample material in Book II (the mystique of the *Conseil d'Etat* has much to answer for in common law comparative studies!) and secondly by reducing the amount of citation from works of a comparative nature which might fairly be expected to appear in the most modest U.S. (or even British) law library, such as Lawson's excellent *A Common Lawyer Looks at the Civil Law* or Hamson's *Hamlyn Lectures*—a reference is surely sufficient. Again, in this connection, it is reasonable to assume that comparative studies come late in the student's course when he has—or should have—a fair acquaintance with the bases of his own legal system's approach to problems; so that it is surely unnecessary to incorporate sections from standard textbooks, like Harper's *Torts*, etc.—citation from common law periodical literature is a different matter. It is felt to be a fault that so little attention, relatively, is given to the Roman law itself; and again, on this topic, in view of the authoritative material adopted in other fields (and with all respect to the distinguished author recently deceased), a somewhat more comprehensive source might have been found than Lee's *Elements of Roman Law*. In the Contract and Torts sections, which naturally form the heart of the work, the author's questions are sound and well designed to stimulate thought on the principles involved, so far as they go. One must, though, indicate regret that more problems were not included, designed to afford practical examples of the operation of different principles—often, perhaps, to produce the same factual result. But such criticisms must not detract from the very real achievement of Professor von Mehren in producing a volume which, carefully used, would give a very fine insight into continental legal thinking.

Not the least benefit conferred by the author on his English-speaking (and so notoriously non-linguist) intended public is that all the French and German source materials (they include the general tables and relevant sections of the French and German Codes) are rendered into English. Though, here again, a point is submitted for the author's consideration when a new edition is prepared. While the German judgment—or rather court's opinion—is given in a form easily acceptable to the student trained in the common law, its French counterpart follows a pattern which, faithfully translated as here (really, too faithfully as when, *e.g.*, individuals become *Mr.* Portalis, etc.), is frankly almost gibberish: it would surely be permissible to render such decisions into a form comprehensible if remote from the original.

J. A. C. Thomas.

Principles of the Law of Contract. By J. F. Wilson, M.A. 1957. London: Sweet & Maxwell, Ltd. Price 35s. net.

A Casebook on Contract. By J. C. Smith, M.A., Barrister-at-Law, and J. A. C. Thomas, M.A., LL.B., Barrister-at-Law. 1957. London: Sweet & Maxwell, Ltd. Price £2 5s. net.

The *cognoscenti* of the common law will pass their own judgment on these two books which the present writer is privileged to review, but they will speak as those within the Covenant. For the present reviewer, however, the importance of these works is related to comparative law—their value to those who do not accept the Common Law as the definitive revelation of legal science, but who grope, as outsiders, after comprehension of its mysteries. Whatever views one may hold on the theoretical value of the contribution made by English law to the theory of obligations, one cannot withhold admiration from the industry and skill with which that contribution has been set forth in scholarly works during recent years—Pollock, Winfield, Anson, Cheshire and Fifoot. None rest securely on their laurels, for the vitality of legal scholarship in the homeland of the common law is exuberant and exciting—indeed exciting envy in a " mixed system " where such rare contributions are made to legal literature, and of these so few are purchased or appreciated. Professor Thomas, of course, holds a Chair of Civil Law in a Scottish University, but so far, to our loss, his pen has not been employed in defence or development of the Civilian heritage of Scots law—which is the more to be regretted as he writes most ably on the English common law and on the civil law of antiquity.

Mr. Wilson's work on contract may be warmly commended to all those who desire insight into the English law of contract; and for those who believe that the Scottish and English laws on contract are identical, except for the doctrines of consideration and *jus quaesitum tertio*, it may be prescribed in substantial doses. His style is lucid and convincing, his thought original and at times prophetic, *e.g.*, on frustration (see his p. 299 and *Davis Contractors, Ltd.* v. *Fareham U. D. C.* [1956] A.C. 696), and his layout admirably contrived to concentrate on controversial issues or on problems which have hitherto been treated with relatively slight attention.

Unlike Scottish law and Civilian systems in general, English law, as Mr. Wilson shows, was late in developing general theories of contract, and eventually did so on the basis of the bargain (pp. 10 and 69) rather than on promise or the declared will to create legal relations. The touchstone of consideration is felt by the common lawyers to serve a useful purpose still (*cf.* Gorla, *Il Contratto*, i, 390, 400; ii, 560 *et seq.*), and Mr. Wilson is no exception. Criticising the Report of the Law Revision Committee (1937) which in general favoured Lord Mansfield's views on form and consideration, the learned author observes (69), " On the other hand, the adoption of the suggested alternatives to consideration as a test of legal intention is more open to criticism. They all fail to recognise the basic common law distinction between a promise and a bargain. Again, to enforce a promise merely on the ground that the promisee is apt to act in reliance on it would open the way to the widespread enforcement of gratuitous promises." For a civil lawyer there is nothing here for tears, but Smith and Thomas focus well the issue between the two approaches in their citation from Williston (118): " The further statement of Savigny which has been popularised for English and American lawyers by Sir Frederick Pollock and others, that not only mental assent to a promise in fact, but an intent to form a legal relation, is the requisite for the formation of contracts, is part of the same system criticised in the preceding section (the Civil Law) and cannot be accepted. Such a repetition of the opinion of an influential civil law jurist shows the danger of assuming that a sound principle in that law may be successfully transplanted. Nowhere is there greater danger in contemplating such a transfer than in the law governing the formation of contracts."

Mr. Wilson has dissected the different impacts on legal relations of law and equity in particular in the context of mistake and misrepresentation; and treats unilateral and common mistake in different sections of his work. This arrangement seems most admirable, and compels attention to the different consequences. Though one not trained in the common law may well be mystified by the bewilderingly different solutions of law and in equity nearly a century after fusion was enacted, it is essential that these distinctions should always be made clear. There would be less haphazard citation of English authority in Scotland—especially on such topics as error and "void or voidable" contracts if there were fuller realisations that in English law a solution valid at one level may be invalidated at another—within the same legal system. At least thanks may be rendered that Lord Eldon did not have his way as with jury trial, and thrust on Scotland the dichotomy of law and equity.

Two points may be stressed in particular on Wilson's approach to Mistake. He approaches the problem of *error in persona* more broadly than the majority of English text writers and, it is thought, with more enlightenment. The learned author observes (p. 107): "Many writers have asserted that proof of an intention to deal exclusively with a third identifiable person is an essential requirement of this type of mistake. Undoubtedly this is the most decisive method of proving that A did not intend to deal with B, but there appears to be no reason why it should be the only method of doing so." Again, in dealing with "common mistake" at common law, in particular with *Bell* v. *Lever Brothers* [1932] A.C. 161, Wilson weighs (pp. 272 *et seq.*, *cf.* Smith and Thomas, p. 385) against each other the views (*a*) that common mistake will only operate if the parties are mistaken as to some fact which destroys the identity of the subject-matter of contract, and (*b*) that the doctrine applies when there has been failure of some common assumption which frustrates the object which the parties had in mind when they concluded their agreement. The learned author himself favours the view that category (*b*) comprises more than non-existence of the subject-matter or purchase of a *res sua*, and most relevantly associates his argument with the problem of frustration (p. 272). "When the procession (*scil.* in *Krell* v. *Henry* [1903] 2 K.B. 740) was later cancelled, it was held that, as the entire purpose of the contract had been frustrated, the parties should be discharged from all further obligations under it. It would be difficult to justify a different conclusion in a case where, unknown to the parties, the Coronation procession had been cancelled a short time before the contract had been concluded." Wilson's treatment of the effects of illegality and severance of unenforceable promises is most illuminating, and he is to be congratulated generally on his treatment of the law of contract as a whole—rather than in ostensibly self-contained sections. The reader with or without a background of English law will be struck by the very different approaches to contract of civilians and common lawyers, but he will have made as clear to him as may be in

Mr. Wilson's most lucid exposition the somewhat bewildering devices by which the English law achieves on the whole satisfactory solutions. While he who is not a common lawyer will not be converted, he will at least be enlightened. This, in the reviewer's opinion, is a most readable and instructive work—and would be his first choice of an introductory English work on contract for the outside student.

Smith and Thomas's *Casebook on Contract* is, of course, substantially a culling of other men's flowers (and these do not call for review); but the selection has been made with skill and insight, and will surely achieve its end of provoking thought and discussion. Case method teaching is particulary suited to the common law, is one of the most notable contributions of the American Law Schools, and has been applied with striking success by, *e.g.*, Professor Mitchell Franklin at Tulane to teaching Obligations even in a civil law jurisdiction. It is, however, a slow teaching technique, though its rewards in audience-participation may fully justify it where the teacher is first-class. The learned authors of the work under review have, however, not restricted themselves merely to case law. Their selections from relevant legal treatises and articles and their own questions greatly enhance the value of the work as an ancillary to the study of the common law approach to contract. On "conditions" and "remoteness" one hopes that the next edition will deal with a problem over which English law at present seems somewhat confused—namely the competency of claiming damages under, *e.g.*, a hire-purchase contract, when the owner has treated a trivial breach as a condition and has opted to terminate the contract. Can it be said reasonably that in these circumstances he who rescinds should also have a claim for damages at all in respect of the premature termination of contract? Some minor points may be noted for the second edition. At p. 293, line 4, for "of" one presumably should read "or." Again, when one of the authors holds a Law Chair in a Scottish University, his authority commands respect when Scottish citations are used. Yet the citation of *Countess of Dunmore* v. *Alexander* (p. 80) does not conform to Scottish practice, and *Spence* v. *Crawford* (p. 449) in effect masquerades as an English decision. Learned English lawyers, incidentally, have expressed doubt to the reviewer whether the principle of that case would necessarily apply in England.

The works of Mr. Wilson and of Professors J. C. Smith and Thomas have been published with the attention to detail which one associates with Sweet & Maxwell. Authors and publishers alike are to be congratulated warmly, with the reservations noted, on the fruits of their labours.

T. B. SMITH.

Protection from Power under English Law. By Lord MacDermott. Hamlyn Lectures, Ninth Series. 1957. London: Stevens & Sons, Ltd. Price 16s. 6d. net.

In this most interesting and valuable series of Lectures Lord MacDermott treats of and discusses a topic of the utmost importance to everyone—how far does the law deal with, and to what extent ought it to meet, " those concentrations or regions of power which, by their weight or their nature, conduce to the oppression of the individual? " And he concludes that, while the law cannot protect the citizen from all power, some protection is now generally regarded as within the law's province and something has been done in fact to fulfil that function. The proper measure of that protection is to hold a just balance between power and liberty. But what is the criterion of a just balance? he asks; and where is the assurance that it is truly just? A partial answer he finds in a superior law such as the U.S.A. possesses under its constitution, but in this country the solution he thinks lies in the human soul, in faith and the spirit, in the hearts of the people, in short, in the ordinary virtues of kindliness, honesty, and courage.

Now in reaching this conclusion, he begins by stressing the vital importance of this issue of protection from power to the ordinary citizen who, faced with a revolution in the pattern of British society, must now realise and understand the problem of the control of the power that has grown up round him, and must not take the legal system for granted but understand its purpose and development. This is vital if he is to preserve for himself and his heirs the long-established and essential liberties. He must further consider the essentials that the law should nourish and promote. And he finds three fundamental considerations in the effective preservation of public order, the embodiment of the rule of law, and the upholding of what is morally superior, what is fair, just and good—as to what is such he thinks there is considerable unanimity—and of these three the last he considers the one that must be watched most carefully, for the danger of a weakness or slipping away is as he says " insidious and retrogression may readily be ascribed to wrong causes." And in an endeavour to help the ordinary citizen (which is not always easy) to find out whether the law is slipping away from this standard, he turns to what he says is very near the heart of the matter—" the vital region of protection from power."

First, he examines the power of prosecution, and—from an historical aspect—looks at the position of the Attorney-General *vis-à-vis* the Executive; and he concludes that here at any rate the citizen is as fully protected as ever against any abuse of this great power. Next, he deals with the power of Parliament and the safeguards against its abuse, though in view of the opportunities for abuse the individual must be constantly on his guard. He mentions as a powerful example statutes which enable a minister, department of state or public authority to prejudice the individual in his status, liberty, property or livelihood by the exercise of an unfettered discretion. Here he refers to the safeguards that should be given—*audi alteram partem* and a right of appeal. In general he considers more could be done to reduce or avoid the obscurity of Parliament's real intention.

In dealing with the next power—that of the Executive—he considers the safeguards against abuse by administrative tribunals (so recently the subject of the Franks Committee report), the prerogative and the ordinary remedies and possible procedural reforms in England. Then the immunities of the Crown are treated of, such as the privilege in regard to production of documents as laid down for England in the *Thetis* case. He shows how the Crown's liability in tort has been unfortunately limited by the proviso to section 2 of the 1947 Act which compels consideration of any duty owed by the servant or agent of the Crown. This part of the book concludes with a number of suggestions of safeguards, the need for which is being, the learned author thinks, increasingly realised.

The next power examined is that of wealth and status, leading to a consideration of the commanding position of public service corporations and then on to a most interesting review of the legal aid system. He refers to the difficulty of the person not poor enough to get effective aid and yet not financially able to face costly litigation, and in this connection, quoting from Lord Cooper's famous Sheffield address, he suggests " that there is something to be said for the view that litigation could be made cheaper if it were made simpler." The power of trade unions and of employees is next dealt with, and in the course of an historical survey he points out that in relation to the duty of a master about the safety and welfare of his servants " the light came " from Scotland—*Sword* v. *Cameron* (1839) 1 D. 493 and later cases which were at once accepted in England.

After a consideration of the power of monopoly and restrictive trade agreements and the steps taken to guard against their abuse the book concludes with the subject of the power of numbers, in particular that of trade unions, the power of which " is now of a magnitude to invite attention and cause concern." The calling of strikes and the maintenance of restrictive practices has " undoubtedly inflicted much economic damage on the nation ": could the law do more to protect the public interest, with a fair regard for the other interests involved? he asks. Some statutory regulation of union power is " now desirable "; to achieve this end he suggests some steps which at least, he says, seem practicable legally. And, finally, in considering the effect of a union's power on an individual he has some valuable comments on the " closed shop." The time, he says, is approaching when a choice will have to be made between a quest for more power or the principle of voluntary association under the law.

This volume of the ninth series of the Lectures delivered at Belfast in November, 1957, in which naturally Northern Ireland law receives attention, ought to be read widely. Not only is its subject-matter of vital importance to the layman as well as the lawyer but it aptly fulfils the purpose of the Trust lectures to further the knowledge of our system of law. To the man in the street it will prove as interesting and readable as to the lawyer: it can indeed be perused with profit more than once. The publishers are to be congratulated on the speed of publication as well as the set-up of the book.

G. C. H. P.

The Law of Negotiable Instruments in South Africa. Third Edition. By Denis V. Cowen, Professor of Comparative and Commercial Law in the University of Cape Town, of the Inner Temple, Barrister-at-Law, Advocate of the Supreme Court of South Africa. 1955. Cape Town: Juta & Company, Ltd.

It is always interesting, when another work on negotiable instruments appears, to ascertain whether it is to be classified with Byles' treatise or Chalmers' digest, Willis's lectures or Hamilton's comments; and even more interesting to discover that it is, as this one is, in a class by itself. Dealing primarily with the Roman-Dutch law of South Africa, the learned author has laid under contribution numerous other systems widely separated in space and time in a well-directed effort to do justice to what Chalmers has aptly described as " the most cosmopolitan of all contracts."

The book is written for the professions of law, banking and accountancy, and to assist students, with the practical view that technical legal rules must accommodate themselves to business needs. To these ends, the substance of the law is set out in a succession of clearly written chapters, moving from the general themes of negotiability and sources to the particular matters of form, liability and discharge; cheques and their crossing are given special consideration; and there is added a perspicuous chapter on the conflict of laws. Corresponding rules in other systems are collated and discussed in footnotes, and historical sources indicated. In the first appendix is reproduced the Cape Act of 1893, based on our own Act of 1882, and after each section is set out a table of comparative legislation in the other states of Southern Africa, the Commonwealth countries and the United States of America. In a second appendix are collected bibliographical notes relating to the legal history of negotiable instruments; the period of development, sixteenth to eighteenth centuries; modern commentaries; and comparative law: and the countries represented are England, Scotland, Australia, New Zealand, Canada, India, Union of South Africa, United States of America, France, Germany, Holland and Italy. Truly the volume, though of manageable size, is encyclopaedic in its range!

This work, while of practical use primarily to those who teach and practise law in South Africa, is of interest and service far beyond that country, and not least in Scotland. Fourteen decisions of our courts are cited, the dicta of our judges are quoted, and the works of six of our writers are listed. Among these last, might there be included in the next edition a reference to the clear and succinct chapter in J. A. Lillie's *Mercantile Law of Scotland*? The full and exact exposition of comparative law has, moreover, for us a significance best expressed in these words of the late Lord Cooper: " For five hundred years Scotland was *par excellence* the home of Comparative Law . . . It was not in the invention of new doctrines or procedural methods that the genius of the architects of our system was displayed, but in the creation of a synthesis of philosophical jurisprudence . . . It is to this that we owe the breadth and flexibility of Scots Law . . . and these results would have been impossible without the comparative study of law and the repeated fruitful contacts which were maintained with selected foreign legal systems. If these influences and the spirit which inspired their utilisation cease to flourish, Scots Law as an independent system will assuredly perish."

D. MAXWELL.

Aims and Methods of Legal Research: Conference held at Michigan Law School, 1955. Edited by Alfred F. Conard. 1957. Ann Arbor, Michigan: University of Michigan Law School.

This book reprints the addresses delivered, and the points made in the discussions which followed, at a Conference held at Michigan in November 1955. The Conference was called so that those who were administering legal research programmes might profit from talking to others who had had experience over the years of the same problems. It was also, as one can readily gather from between the lines of the reprinted addresses, a "get-together" of many of the best-known figures of American law teaching and research. Karl Llewellyn, Hessel Yntema and David Cavers need no introduction on this side of the Atlantic.

Much of value emerges from the discussions and much that British Universities should attend to if they are to make a significant contribution by research to new knowledge of and about law. Firstly, as Karl Llewellyn points out in a typically amusing opening address on Social Significance in Legal Problems, there is an important distinction between doctrinal and non-doctrinal research. The former is what we are accustomed to, the deep digging to find what the true rules of perpetuities or conflict or negligence are, however misunderstood or ill-applied they may have been in specific cases. Non-doctrinal research deals with the working and significance and effect of legal rules. This kind of research involves non-legal techniques and frequently will require the co-operation of sociologists and other non-lawyers, field work in getting information, and extensive use of statistics.

A fascinating example is provided by the last address, by Professor Harry Kalven, Director of the University of Chicago Jury Project, which is investigating, as has probably never been done before, the way juries work. If only the results of such a project could be put before Lord Strachan's Committee which is currently investigating Civil Jury Trial in Scotland! This project involves interviewing judges and jurors, and the playing over of recordings of mock trials, based on real cases, to several experimental juries, and testing their different reactions and verdicts. Some of the results to date were interesting: in eighteen per cent. of cases judge and jury disagreed on liability; in only forty-one per cent. of cases were judge and jury in agreement on both verdict and damages. This project, which is being carried out on a large scale, is of great significance for the reform of procedure: it is only if this sort of thing is done that we have any rational grounds for trusting juries. But such a project needs men and money and time and skill. Hence Dean Cavers touches on a vital problem in his contribution on Manpower for Research.

An obvious field for non-doctrinal field research is touched on in two papers on Law and Some Aspects of Criminal Conduct and The Legal Scholar and the Criminal Law, both showing how the lawyer must come out of his study and have a look at the working of the criminal law. In Research for Legislation, Professor Nutting shows how proper legislative drafting must depend on getting to know the problems and difficulties of those involved in the subject-matter of the legislation, Housing, or Pensions, or Finance, before settling down to draft a Bill. The same is true of contracts and wills. Lastly, in Looking out of the Cave, Professor Yntema discusses the need for comparative legal research and incidentally castigates the inadequate equipment and training of the ordinary law school man in America to do any such work. It is refreshing to find ignorance of Latin, History and Philosophy criticised, not only for their factual content, but for what they train the mind to do.

The book possibly does not quite live up to its title in that it tells little directly about the aims and methods of legal research, but much appears from the reading and, above all, the crying necessity, if law is to hold its place among the social sciences, for research *about* law and not merely or technically *in* law, not merely what the rules are, but how they work and what law *does* in society. The Conference was worth holding and we are glad to have the fruits of it, and envious of what is being done.

David M. Walker.

Baron David Hume's Lectures, 1786–1822. Vol. VI and Supplement. Edited and annotated by G. Campbell H. Paton, M.A., LL.B., Advocate, Lecturer in the History of Scots Law in the University of Glasgow. 1958. Edinburgh: The Stair Society.

Mr. Paton has now brought to a masterly conclusion a definitive edition of Baron Hume's *Lectures*. The Scots lawyer and Scots legal historian has now before him not only an easily read version of the text, but an apparatus of notes which the reader has merely to use to appreciate. The final volume includes an essay in which Mr. Paton sketches the life of Baron Hume and concludes with an index to the whole six volumes. In addition, however, to the six published volumes, Mr. Paton has edited, and the Stair Society has issued to the Scottish University libraries and the major professional libraries, a duplicated *Supplement* to these lectures containing certain material prepared by Hume but omitted from his lectures in later years. It is now possible for the reader to assess as a whole the lectures upon which Hume's contemporary reputation was based.

It may be appropriate first to consider the contents of Volume VI and of the *Supplement*. The earlier part of Volume VI contains the continuation of Baron Hume's lectures upon procedure and evidence and diligence, and the process of *Cessio Bonorum*. The book opens with a chapter on probation in writing, which discusses exhaustively the execution of deeds. Thereafter Baron Hume discusses decrees and the review of decrees, before dealing with diligence. This is an important subject which tends to be neglected in the teaching of law today, but Baron Hume's feet were firmly planted on the ground and the matter is given the prominence which it deserves. Also printed in Volume VI are chapters on teinds and patronage. Hume, on the whole, is incurious about the history of the law, but in the matter of teinds he gives quite a detailed historical introduction, which is especially valuable for post-medieval developments. The *Supplement* contains historical remarks upon certain branches of feudal law which, we are told, were omitted from the lectures in later years. These historical excursions add little or nothing to what has been said by Craig and Ross. There is a thoughtful chapter entitled "The Vassal's Estate," dealing chiefly with rules of construction to determine the extent of the grant. This is followed by a discussion of heritable bonds, in which Hume's debt to Ross is apparent. Only part of Hume's discussion of the service of heirs was printed in Volume V and Mr. Paton prints next the balance of that chapter. It is a very full and valuable exposition of the law. The *Supplement* concludes with a commentary on the early bankruptcy statutes.

Mr. Paton's biography of Baron Hume has been compiled with his usual care and accuracy. Although, one suspects the biography would have appealed to its subject, it tends to be rather dry and factual. The reviewer would like to have known much more about Hume as a man. His intimate relationship as a youth with his uncle, David Hume the philosopher (who spoke of the future Baron's " tenderness and friendship "), presents him in a favourable light. On the other hand, Scott spoke of his " anxious temper " and his *Lectures* are of a grim matter-of-factness which one associates with an *ex facie* absolute disposition. Somewhere behind the scenes there may have been a back-letter in which humanity was allowed some play, but the back-letter does not appear in Mr. Paton's record. The inference may be that it did not exist. Henry Cockburn has remarked: " I have the idea of a good Scotch dialogue between [John Thomson] and his great friend, John Allen, in Elysium, joined by Baron Hume, the first Lord Melville, Braxfield, Sir Harry Moncrieff, and Sir James Gibson-Craig, who must die by anticipation. Braxfield, who was called to the Bar in 1744, and probably never saw a good Scotch change except his own promotion, should represent the coarseness and political prostration of that last of our barbarous ages; Hume should be the type of our respectable narrow-minded bigotry; Sir Harry, of the best of our old Church, and he would certainly lament that he did not live to avert or to join the Free; Sir James, of that resolute band who stood in the dark period and actively forwarded the brighter day that he survived to see. Thomson would be his companion in this, and he and Allen should be the chief, and the best, provokers of the talk. . . . Melville should represent all sides; defending the old system as natural for Scotland in the last age, and the new in this. Except Hume, they would all end in jolly good humour, and with a strong bias towards the prevailing tendency of what cannot be helped; but Hume would retire in horror, and pass his eternity in solitude or with Glenlee." [Henry Cockburn's *Journal* (Edinburgh, 1874), vol. II, p. 164.] These remarks are not to be explained merely by Lockhart's political differences with Hume. They are entirely in character with what we know of the man from his writings and from his conduct, for example his relations with the Speculative Society.

In his assessment of Baron Hume's work Mr. Paton is restrained to the point of excess. His knowledge of Hume's writings is unlikely to be approached; yet he is usually content to quote the opinions of others rather than to state his own. While for a definitive evaluation of Baron Hume's *Lectures* the reader must await the pen of a scholar with unlimited time and patience at his command, the method of approach to such an evaluation is reasonably clear. Hume sets out explicitly his aims in giving his course of lectures. He can be judged both from the point of view of the adequacy of these aims and from that of his success in realising them. Few would quarrel with Hume's aims:

" . . . the person who holds this Chair ought not, I think, to regard himself as called upon to furnish his pupils with a complete digest of the Law, perfect in all its parts, and which they are to keep by them as a repository of authorities, to be resorted to for their direction in practice . . . What young men stand in need of is an elementary view of the subject, such as may enable them to understand those works [the legal treatises], and to peruse them profitably. Indeed it would not be right, even if it were practicable, to relieve the student from the wholesome office of seeking for knowledge by the efforts of his own attention; nor is it the tutor's business to save him the trouble of private research and thinking for himself, but to guide him only in the direction of his industry, and enable him to turn it to account. . . . One thing, which seems in a peculiar manner to be part of his duty, is to lay before his hearers the history of the law, tracing its progress to its present state, through the successive changes it has undergone, and pointing out the causes and motives of these alterations." Desirable though these aims are, one expects one thing more in a university course in law: " But before anyone can deserve the praise of being an enlightened expounder of a system of law," Lord Cockburn points out, " . . . the prior actings of course ought not to be merely stated, but to be criticised and appreciated, so that future tribunals may be guided, and the public instructed, on defects and remedies " [*Memorials*, 1874 ed., p. 144].

The reviewer's impression is that Hume did not entirely fulfil in practice his own avowed aims. He did start off with the good intention of viewing the law in its historical setting, but all too frequently the historical material was omitted from the Lectures and, where not omitted, it was superficial. For the most part, he was content to take his history from others and nowhere makes any original contribution to its study. This is only to be expected from one who stressed its " business " utility. Hume, for better or worse, was not among those people who loved learning for its own sake. Without his own guidance on the matter one would have supposed that his aim was to provide an up-to-the-minute institutional treatise on Scots law. Students seem to have been attracted to the lectures by this very fact. We know that they did keep their lecture notes " as a repository of authorities, to be resorted to for their direction in practice." What is lacking in the *Lectures* is effective concentration on basic principles. These can be illustrated better by citing a few limiting cases than by confusing the student with a bombastic display of authorities. The lecturer's aim is, or should be, to use cases sparingly but to analyse those used in patient detail and to extract as much as possible from each. Every trivial proposition need not be supported by authority: that is the function of the practitioner's work. The reviewer senses that Hume was well aware of this but, with the system of attendance fees, took the course which attracted most students. G. J. Bell, who was Baron Hume's successor in the Chair of Scots Law, felt that Hume's minute and detailed discussion of the law did not form " the proper object of an academical course." Bell's own lectures, therefore, are considerably shorter and laid greater emphasis on principle.

Lord Cockburn had Hume in mind when he suggested that the law teacher had a duty not merely to state, but to appreciate and criticise, the decisions of the courts. Hume did analyse the cases, and criticised those which he disliked, but his criticisms were confined to a narrow and rather technical level. He was largely unconcerned with the social purposes of the law. Nor was his appreciation of Scots law based, as was that of Stair and, to a lesser degree, Erskine, upon the prolonged study of Roman and continental authorities. Having little use for such learning, Baron Hume could not stand sufficiently outside the current of the law in which he was immersed to consider what course it would or should take. The result is a vast repository of rather dull, although by no means useless, learning.

The Stair Society has now concluded a remarkable publishing enterprise. They are to be congratulated both on that fact and upon their happy choice of editor. Mr. Paton deserves the deep gratitude of the profession for having borne the whole burden of a most exacting, time-consuming and personally unrewarding task.

A. E. ANTON.

OTHER PUBLICATIONS RECEIVED

(*A later review is not precluded, especially where books are received shortly before going to press.*)

Sir James Fitzjames Stephen, 1829–1894, and his Contribution to the Development of Criminal Law. By Leon Radzinowicz, LL.D. Selden Society Lecture, July 30, 1957. 1957. London: Bernard Quaritch. Price 6s. 6d. net.

The Legality of Nuclear Weapons. By Georg Schwarzenberger, Barrister-at-Law. The Library of World Affairs No. 43. 1958. London: Stevens & Sons, Ltd. Price: paper edition, 3s. 6d.; cloth edition, 10s. net.

The Development of International Law by the International Court. Being a revised edition of *The Development of International Law by the Permanent Court of International Justice (1934).* By Sir Hersch Lauterpacht, Q.C. 1958. London: Stevens & Sons, Ltd. Price £3 3s. net.

Study of Discrimination in Education. By Charles D. Ammoun. 1957. New York: United Nations. Price $U.S. 1.25; 9s. stg.

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The Location of Yamatai. A Case Study in Japanese Historiography 720–1945. By John Young. The Johns Hopkins University Studies in Historical and Political Science. Series LXXV No. 2 (1957). 1958. Baltimore: The Johns Hopkins Press. Price $U.S. 3.00.

An American Constitutional Law Reader. Selected and Edited by Robert B. McKay. Docket Series Volume 12. 1958. New York: Oceana Publications. Price $U.S. 3.50 clothbound; $1.00 paperbound.

JURIDICAL REVIEW

MASTER AND SERVANT

FURTHER HISTORICAL OUTLINES *

I.—*Respondeat Superior*

EDICTAL Liability. The Praetorian Edict *Nautae Caupones Stabularii*[1] was clearly already recognised in Scottish law before Stair in his Institutions[2] commended its application.[3] Erskine[4] likewise acknowledged that "it is, with some variations, adopted into our law."[5] The custodier under the Edict was clearly liable to make reparation for theft of or injury to goods entrusted to him—and, in particular, was answerable for the wrongdoing of his servant, irrespective of whether the master himself was or was not proved to be at fault. In some early Scottish cases the principle of edictal liability was pressed further than modern law would tolerate, and vintners and those who let lodgings were brought within the scope of "*caupones.*"[6] In the case of *Forbes* v. *Steil*[7] the Lords took note of the fact that many persons had had their cloaks stolen while drinking in taverns, and "resolved to make an example" of the defender, in whose tavern a cloak had been taken. It is most unlikely that this case would be followed today.[8]

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* These reflections supplement the writer's article in the *Stair Society Introductory History of Scots Law.* He acknowledges with appreciation suggestions and criticisms made by his colleagues, Mr. A. E. Anton, Dr. E. M. H. Hampson, Mr. W. R. Humphries and Dr. Alexander Lyall.

[1] D.IV.ix.

[2] I.ix.5, xiii.3; IV.xliv.4.

[3] See too Mor.Dict., s.v. *Nautae Caupones Stabularii.*

[4] III.i.28.

[5] See also Bankton, I.vii.1–2; Bell, § 235–245, *Comm.*, i.498.

[6] *Forbes* v. *Steil* (1687) Mor. 9233; *May* v. *Wingate* (1694) Mor. 9236, *cf. Watling* v. *Macdowall* (1825) 4 S. 83.

[7] *Supra.*

[8] See further Guthrie Smith, *Reparation*, pp. 403 *et seq.*; Mackintosh, 47 J.R. 54, revising and amplifying 3 J.R. 306; also authorities in *Mustard* v. *Paterson*, 1923 S.C. 142, S.L.T. 21; *Sinclair* v. *Juner*, 1952 S.C. 35, S.L.T. 181; *Burns* v. *Royal Hotel*, 1957 S.L.T. 53.

"Vicarious" Liability of Masters Generally.[8a] Liability under the Edict was recognised by Stair[9] as "rather introduced by statutory law for common utility than by natural obligation," and was thus in some cases an exception to the general principle of liability based on personal fault, though as Bankton in particular indicates the idea of fault may be present even in cases under the Edict. The reconciliation of the principle "*culpa tenet suos auctores*" with a general doctrine of *respondeat superior* caused—and indeed still causes[10]—anxiety to Scottish judges. So far as primary liability of a master was concerned, no difficulty arose. If a master specifically ordered his servant to perform an act which resulted in injury, or if he hired incompetent or vicious servants, who he should have foreseen might cause injury, and yet failed to restrain them, the master was clearly himself at fault and therefore liable.[11] Primary liability might also be incurred in matters of "public policy."[12] Further, in one instance in 1623 the Court of Session—on an arbitrary presumption of mandate—held a master liable for his servants' wrongful seizure of other persons' property, "seeing that, if it were other ways decerned, powerful men might secretly direct their household servants to oppress their neighbours . . . and eschew the pain, because the pursuer could not prove the secret command given by the master to his servant."[13] This presumption would apparently only operate to infer general liability of the master when the servants who had committed the wrong had been feed from term to term.[14] This somewhat rough justice may well have been warranted

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[8a] Only recently has it been clearly appreciated that so called "vicarious" liability of an employer comprises distinct categories covering cases where the employer is in breach of a primary duty and also cases where the servant's act is imputed to him. See Sheriff K. W. B. Middleton's masterly summary 1958 J.R. 85.

[9] *Supra.*

[10] *Kilboy* v. *S.E. Fire Area Joint Cttee.*, 1952 S.C. 280, at p. 285, S.L.T. 332, at p. 335; *Webb* v. *Inglis* 1958 S.L.T. (Notes) 8.

[11] Stair, I.ix.5, Bankton, I.ii.54, Kames, *Equity*, 4th ed., i.63.

[12] *Innes* v. *Magistrates of Edinburgh* (1798) Mor. 13189.

[13] *Murislaw* v. *Haliburton*, Mor. 13984.

[14] *Galbraith* v. *Anderson* (1617), *ibid.*

by conditions in the early seventeenth century, when the authority of a master, a laird or a chieftain was often more to be feared than the general law of the country.

Recognition of a master's secondary liability for the wrongdoing of his servant—in cases where the master was not personally at fault but had his servant's act imputed to him—was firmly established in Scotland only during the nineteenth century. Problems as to how far in such cases the doctrine of *respondeat superior* should be admitted, and concerning the principles which governed its admission, were not easily nor uniformly solved. Where the person injured by the servant's fault could show that the master owed a contractual duty—as of safe carriage of the pursuer—it was least difficult to fasten liability on the master.[15] Where no element of contract was present, it was with some hesitation that the judges imposed vicarious liability on a master for injury caused to a third party by a servant's negligence; and clearly an effort was made to retain the principle of *culpa* in attenuated form in the earlier nineteenth-century cases. When injury resulted from a servant's act within the scope of his employment, the judges tended to make a retrospective assumption that the master had selected the servant without due care, and might therefore be held vicariously liable within the principle *culpa tenet suos auctores*.[16]

Another aspect of judicial reluctance to discard the theory of *culpa* as an element in vicarious responsibility is apparent in certain cases where imputation of careless selection of the servant by the master could not be, or was not in fact, raised. It was then sometimes suggested that, while the master had his servant under observation, he had the power to prevent any malpractice on the latter's part —and might therefore reasonably be held vicariously liable;

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[15] *Brown* v. *Macgregor*, February 26, 1813, F.C.; *Linwood* v. *Hathorn*, May 14, 1817, F.C.; *Allan* v. *McLeish* (1819) 2 Mur. 158; *Gunn* v. *Gardiner* (1820), *ibid.*, 194—*cf. Campbell* v. *Barrie* (1748) Mor. 10071; *Thorburn* v. *Ellis*, May 24, 1811, F.C.

[16] Kames, *supra*, *Miller* v. *Harvie* (1827) 4 Mur. 388; *Baird* v. *Hamilton* (1826) 4 S. 790.

but (unless the servant was known to be unreliable) the master should not be held vicariously liable for the servant's wrongful acts, even within the scope of his employment, if the servant was acting at the material time outside the range of the master's surveillance.[17] It would appear that as late as the third decade of the nineteenth century the doctrine had to be argued that a master might be held liable for the negligent act of a servant committed while not subject to the master's supervision, provided, of course, that the servant had been carefully selected, and had not been employed to do an act which was either wrongful or intrinsically dangerous.[18] In *Linwood* v. *Hathorn*[19] there was considerable division of judicial opinion as to whether the defender should be held liable for a fatal accident caused by the felling of a tree on his estate during his absence and without his orders. The defence seems to have succeeded largely because the pursuer failed to show that those who had undertaken the felling of the tree had express or implied authority to act—but the opinions certainly cover wider ground. An inquiry whether there had been personal *culpa* on the part of the defender was assumed by some of the judges to be relevant in deciding liability.

It came to be accepted in the early nineteenth century[20] that a master could be liable, not only for those acts of his servant which had been expressly ordered by him, but also for acts performed within the common line of the servant's duty—even where the servant had exercised his discretion.[21] The question of *culpa*, however, continued to cause difficulty where the servant had acted against the express orders of his master. In *Keith* v. *Keir*[22] the report bears that a master was found liable for damage done by his servants, who, in his absence, and contrary to his express instructions, had used fire in clearing ground of brushwood

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[17] Hume, *Lectures*, iii.190, contrast opinions in *Baird*, *supra*.

[18] See *Fraser* v. *Dunlop* (1822) 1 S. 243; *Miller* v. *Harvie*, *supra*.

[19] May 14, 1817, F.C. aff. (1821) 1 Shaw's App. 20.

[20] See Bell, 4th ed., § 547.

[21] *Hill* v. *Merricks* (1813) Hume 397.

[22] June 10, 1812, F.C.

—with the result that the fire had spread to the pursuer's forest. *Keith* v. *Keir* has accordingly been cited [23] as an authority for holding a master liable for his servant's wrongful actings carried out despite the master's express prohibition. In *Baird* v. *Hamilton*,[24] however, the Lord Justice-Clerk (Boyle), who in *Linwood* had doubted the soundness of *Keith* v. *Keir*, accepted the authority of that latter decision because the Session papers disclosed the fact —not mentioned in the report—that the master had in fact, before the material time,[25] authorised by letter the use of fire by his servants. Lord Pitmilly, who had been counsel for the defender in *Keith* v. *Keir*, and who was one of the judges in *Baird*, does not, however, advert to this fact; and apparently accepted the wider *ratio* that a master should be held liable for the wrongful acts of his servants—even though he had expressly forbidden them—provided that such acts were committed within the scope of the servant's employment. On the other hand, in another early nineteenth-century case, *Waldie* v. *Duke of Roxburgh*,[26] where servants had acted for a master's benefit despite his express prohibition and in his absence, the latter was held not to be liable. It is arguable—though not certain—that the *ratio decidendi* here was that the wrongful acts were not executed in the respondent's service. This was certainly the proposition contended for by the respondent's counsel. In any event the view seems to have prevailed that a master cannot escape vicarious liability for unjustifiable injury caused by his servant, acting within the scope of his authority, merely by proving wilful disobedience on the part of the servant—any more than a master could plead that he had expressly ordered his servant not to act negligently, but that the latter had failed to obey his instructions.[27] If the servant acted altogether outside the scope of those duties expressly or impliedly committed to him—especially if he had acted merely in furtherance of his own private ends and no contractual or other primary duty was owed by the employer to the party injured—the master has not been held answerable for consequent damage.[28] In this connection a master's express prohibition against his servant acting in a particular way may be very relevant, if it precludes the servant from undertaking certain duties as part of his authorised employment.[29]

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[23] *e.g.*, in *Linwood* v. *Hathorn*, *supra*.

[24] (1826) 4 S. 790.

[25] See Hume, *Lectures*, iii.189, note.

[26] (1822) 1 S. 367, affd. (1825) 1 W. & S. 1.

[27] *Fraser* v. *Younger & Sons* (1867) 5 M. 861.

The encroachment of the doctrine *respondeat superior* upon the fundamental principle of the Scottish law of reparation "*culpa tenet suos auctores*" was exhaustively examined by a Court of Seven Judges in *Woodhead* v. *Gartness Mineral Co.*,[30] and in that case it was apparently accepted that the doctrine of vicarious responsibility of a master for the wrongdoing of his servant should be attributed to expediency rather than to principle, and was an exception to the principle of liability based on personal fault. A master might, however, claim relief from the servant, after meeting a claim for reparation of injury brought against the master by a third party injured by the servant's wrongdoing. Though on grounds of expediency a master was made answerable for the wrongful acts of his servants committed within the scope of their employment, there remained, of course, from 1858 to 1948, the doctrine of *collaborateur*, which might exclude vicarious liability when the pursuer was a fellow servant of the person who had caused the injury. Further, until shortly before *Woodhead* was decided, English influence had excepted statutory trustees from vicarious responsibility for their servants' negligence.[31]

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[28] *Dalrymple* v. *McGill* (1804) Hume 387; *Campbell* v. *Barrie* (1748) Mor. 10071, and see, in modern law, *Power* v. *Central S.M.T.*, 1949 S.C. 376, S.L.T. 302, where, however, the contractual aspect was not adequately considered.

[29] *Waldie*, *supra*, and see in modern law *Alford* v. *Nat. Coal Board*, 1951 S.C. 248, S.L.T. 163.

[30] (1877) 4 R. 469.

[31] See *Virtue* v. *Commissioners of Police of Alloa* (1873) 1 R. 285; *Duncan* v. *Findlater* (1839) McL. & R. 911; *Ross* v. *Heriot's Hospital* (1846) 5 Bell's App. 37; *Mersey Docks Trs.* v. *Gibbs* (1866) L.R. 1 E. & I.App. 93, discussed in Smith, *Doctrines of Judicial Precedent in Scots Law*, 56–57.

II.—*Necessary Service*

Erskine stated[32] that "indigent children" and "vagrants" could be compelled into service. In fact, the scope of legislation during the late sixteenth and the seventeenth centuries extended to even wider classes of the community. Already before the Reformation there had been legislation aimed at setting vagrants to work—such as the Act of 1425[33] which empowered the Sheriffs to arrest "ydil men" and to compel them under penalty to find masters or to adhere to lawful crafts within a period of forty days. By numerous Acts sorners, makars, bards, and "feigned fools" were threatened with corporal punishment. Until the despoiling of the Old Church on the Reformation, the miseries of the poor had been alleviated to some extent by the charity of religious houses. After the Reformation penal repression of vagrancy increased in severity with the increase of the problem of vagrancy, and the Reformers denounced beggary and idleness with particular vehemence. There was also enacted a spate of social legislation designed to compel the able-bodied to work. The First Book of Discipline, 1561, makes clear that this policy had the full support of the leaders of the Kirk—who denounced idleness as sinful.

By an Act of 1579[34] it was provided that the sentence prescribed for vagrants—of scourging and burning through the ear—should be remitted in those cases where some honest and responsible man would undertake in court to keep the offender in his service for the ensuing year. By the same Act, if any vagrant's child between five and fourteen years of age was "liked" by a subject of the realm "of honest estate," the latter should be entitled, it was provided, to an order giving him the child, to be put to work by the applicant until the child reached the age of twenty-four (in the case of males) or the age of eighteen (in the case of females).

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[32] I.vii.61.

[33] A.P.S. ii.11 c. 20.

[34] A.P.S. iii.139 c. 12.

An amending Act of 1597[35] ordered that "strang beggers and thair bairnis" should be employed on "common works"; and furthermore permitted such persons to be impressed into the lifelong service of an individual, instead of merely for the restricted period prescribed by the Act of 1579. The kirk sessions, which were entrusted with carrying out this legislation in the landward districts, seem to have been charitably remiss in discharging their duties; and accordingly, by an Act of 1600,[36] the Scottish Parliament imposed supervision by presbyteries, and also penalties upon kirk sessions which had failed to carry out the official policy against vagrancy—"whereby strang and Idill beggaris, being for the maist pairt theiffis, bairdis, and counterfitt lymmeris, levand maist Insolentlie and Ungodlie . . . Ar sufferrit to vaig and wander throwchout the haill cuntrey." Notwithstanding these measures, the "strang and idill" beggars perversely continued to "vaig and wander." In June, 1605,[37] accordingly, the Convention of Estates enlisted the aid of private enterprise. Any person in need of labour was permitted to seize any beggars encountered by him, to take them before a sheriff or bailie, and, on the victims being declared able-bodied, "to set his burning irne upon thame and reteane them as slaves." In the following year, by the Act of 1606[38] (which also contains provisions regarding the perpetual servitude of colliers), Parliament gave permission to all masters and owners of collieries and salt-pans to apprehend all "vagabonds and sturdie beggars to be put to labour." Like powers—extending even to "masterless men" (*i.e.*, the temporarily unemployed)—were conferred in 1607 by the Privy Council on the owners and lessees of metal mines.[39]

In 1617 the scope of compulsory servitude was extended further by an Act[40] which applied to children who were found to be " poor and indigent and to have no means for their entertainment." These children, with their parents' consent if under the age of fourteen years, and otherwise with their own consent, might be handed over by the magistrates or kirk session of their place of residence to such of the King's subjects as applied to have them as servants. The children thus handed over could be set to domestic work or to a craft, and were bound to this servitude until the age of thirty—not for life as in the case of beggars' children. All earnings gained by children handed over to employers under the 1617 Act were to belong to such employers, and these latter were to have complete disciplinary power over their charges, except for the infliction of torture and death. It does not seem that these opportunities of exploitation were seized on by Scotsmen with the enthusiasm which the legislators had desired, though the provisions of the 1617 Act may have helped to perpetuate servitude in the families of coalminers. By the Act of 1621 [41] the power to impress " loose and masterless " men and women into employment for " competent hire and wages " was conferred on any of the lieges who should find such persons " within their own bounds." Again, in 1649,[42] it was enacted that any of the King's subjects should be free to apprehend " ydle and sturdie beggars " and to employ them or *dispose of them to be employed by others* with no specified limitation as to time or place, and with no other remuneration to the forced labourer than food and clothing.

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[35] A.P.S. iv.140 c. 39.
[36] A.P.S. iv.232 c. 28.
[37] R.P.C., vii.56.
[38] A.P.S. iv.286 c. 10.
[39] R.P.C., vii.434.
[40] A.P.S. iv.542 c. 10.

The effect of these various Acts was that, theoretically, the unemployed and vagrant population of Scotland could be impressed for service, which was in some cases nothing short of slavery, by anyone who had need of them. Nevertheless, the legislators were disappointed. As it was, there was not sufficient work to absorb the available labour, and deportations of vagrants and undesirables were constantly authorised by the Privy Council. The Government, therefore, sought to encourage the establishment of private manufacturies, the owners of which were given extensive powers of conscripting into their service for the space of eleven years the temporarily unemployed as well as habitual vagrants. In 1692, by a proclamation of William and Mary,[43] the forced labour legislation of the century was substantially consolidated and re-enacted. Nevertheless, the problem of vagrancy remained unsolved, despite this legislation. Erskine explained [44] that " few persons were willing to take vagrants into their service." Fletcher of Saltoun would have compelled them.[45]

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[41] A.P.S. iv.623 c. 21.

[42] A.P.S. vi.220 c. 161.

III.—*Apprenticeship* [46]

In *Frame* v. *Campbell* Lord Jeffrey observed [47]: " The contract with an apprentice, though it may *include* a contract to work for hire, is primarily a contract to *teach* and to *learn* a certain trade or handicraft." Accordingly, though in many respects the rules of law applicable to servants and apprentices are identical, there are also material differences.

" The origin of apprenticeship is to be found in the burghal policy of the middle ages—in those guilds or corporations into which craftsmen entered for mutual protection against the feudal oppression of the times, and for the purpose of monopolising the business which they respectively practised." [48] The master craftsmen for centuries resisted all attempts by " unfree " workmen to undertake work appropriated to the particular craft, incorporations or guilds. To restrict admission to craft membership, and to ensure that those admitted were sufficiently skilled in their craft, a system of apprenticeship was instituted and enforced.

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[43] See generally " Slavery in Modern Scotland " (1899) *Edinburgh Review* vol. 189, pp. 135 *et seq.*

[44] I.vii.61.

[45] *Second Discourse concerning the Affairs of Scotland.*

[46] On this topic reference may be made generally to the following authorities: Ersk., I.vii.62, III.iii.16; Bankton, I.ii.57; Bell, § 2185; Hume, *Lectures*, i.345 *et seq.*

[47] (1836) 14 S. at 918.

[48] Fraser, 3rd ed., 335.

As late as 1819 it was held incompetent for a workman to prove his skill at a trade to qualify for admission to the Edinburgh Incorporation of Goldsmiths, unless he could also prove satisfactory completion of an apprenticeship.[49]

The apprenticeship system did not apply in agricultural work[50]; and Fraser observed[51] that it was only introduced " late " in professions such as the law and medicine. While it is true that practitioners of law and medicine did not organise themselves as early as many of the incorporated trades, when they reached the stage of forming societies in the burghs they seem to have followed the example of Craft Incorporations and instituted apprenticeship systems. Even before this stage of development, it would seem that some form of apprenticeship, or quasi-apprenticeship at least, was necessary for a youth aspiring to the callings of law and medicine.[51a] Thus, when in 1505–6 the " surregeanis and barbouris " of Edinburgh—the forerunners of the Royal College of Surgeons—were incorporated with their Seal of Cause, a form of apprenticeship was contemplated for members, and there is ample documentary evidence of " medical apprenticeships " during the sixteenth, seventeenth and eighteenth centuries. The Aberdeen Medical and Chirurgical Society has in its possession an indenture of apprenticeship for five years between Dr. William Chalmers and William Ross, son of John Ross, Weaver; it is very similar in its terms to a law apprenticeship.[52] This is dated as late as 1782. The " barbers, surgeons and periwig makers " were granted a Seal of Cause by the Aberdeen Town Council in 1537, authorising them to elect a deacon and to make rules for entrants as in other crafts—which would imply the power to make rules for apprentices.[53] When the Merchants and Trades House was set up in Glasgow in 1605, the founder of the Royal Faculty of Physicians and Surgeons of Glasgow (which received a royal charter in 1599) appeared as a Trades delegate, and an Incorporation of Barbers and Surgeons in Glasgow was set up later. In short, until quite modern times, medicine in Scotland was organised more as a craft than as a profession. Discussion of the status of lawyers in the burghs generally is outwith the scope of this paper. Sir John Muirhead has, however, observed[54] that the legal bodies refer to themselves as if they were corporate bodies, rather resembling the Craft Incorporations. The Fraternity of Writers in Stirling, for instance, had a Deacon of its own, and the Glasgow Procurators referred to their admission fees as " freedom fines," and had rules about admission at the Near Hand and Far Hand. Legal apprenticeship was certainly officially recognised before 1600. By the Act of 1587, c. 45 (A.P.S. iii, 448 c. 29) a seven-year apprenticeship was prescribed for Notaries Public —though only a five-year period was insisted on in the Act of Sederunt of December 31, 1595. The Minutes of the Society of Writers to Her Majesty's Signet have an entry for 1598, fixing a three-year period of apprenticeship, and, as is well known, the apprenticeship tradition in that Society has been a factor of greatest value in maintaining its high reputation.

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[49] *Spence* v. *Howden* (1819) 2 Mur. 167; and see generally Bain, *Merchant Crafts and Guilds of Aberdeen.*

[50] *Cf.* the position in England, where apprenticeship in agriculture, due largely to poor law measures, was used extensively.

[51] (1846) 1st ed., 586.

[51a] For law see 37 J.R., p. 169.

[52] See E. Rodger, *Aberdeen Doctors at Home and Abroad*; also P. J. Anderson, *Studies in the History of the University of Aberdeen.*

Familial and monopolistic characteristics of the Crafts are apparent in regulations such as those of the Edinburgh Hatmakers in 1473, which provided that no apprentices should be taken for a shorter period than five years, unless they were sons of members of the craft; and that these latter were to be bound only for three years. The Masons and Wrights of the same city demanded a seven-year apprenticeship as a condition of admission, but even thereafter, unless the applicant could demonstrate sufficient skill, he had to continue in service until he could prove himself fit to be a master.[55] The would-be intruder into a craft could accordingly be deterred, not only by the length of apprenticeship, but also by the rigour of the qualifying tests required of him. Relaxation of conditions of entry to a craft might be made in favour of sons and sons-in-law of master-craftsmen, both in respect of length of apprenticeship and also of the practical assay. In a stable society with small burgh communities it was, of course, desirable to restrict entry to a craft so as to ensure an adequate livelihood for all who were admitted.

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[53] Bain, 117. For a short account of medical education, see Hamilton, *History of the Homeland*, 281 *et seq.*

[54] (1952) 68 S.L.R. 25.

The contract or indenture of apprenticeship required formal writing, though, if defective in legal solemnities, it might be validated *rei interventu*.[56] Since the apprentice was usually under age, the boy's administrator-in-law or tutor took burden on himself in the case of a pupil, and the curators of minor *pubes* consented to their obligations. It was also usual to have cautioners for the due discharge by the apprentice of his duties. There are numerous examples in the Protocol Books of notarial instruments narrating particulars of contracts of apprenticeship in the various crafts.[57] During the sixteenth century it would seem to have been an accepted practice for part at least of a male child's portion of the legitim fund to be paid over to a master-craftsman, in consideration of his undertaking the training of the boy as apprentice.[58]

The duties of the apprentice, by which he was bound, were to enter on and learn the trade practised by his master;

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[55] Marwick, *Edinburgh Guilds and Crafts*, 47–48. See also Bain, 83 *et seq.* and 103 *et seq.*

[56] *Rymer* v. *McIntyre* (1781) Mor. 5726; *Neil* v. *Vashon* (1807) Hume 20.

[57] Prot. Book of Mr. Cuthbert Simon (Grampian Club), Nos. 10 and 282—contracts of apprenticeship to a painter and smith respectively, dated 1500 and 1508; Prot. Book of Mr. Gavin Ros (Scot.Rec.Soc., 1908), No. 315—apprenticeship to a skinner (1519); Prot. Book of Mr. Gilbert Grote (*supra*), Nos. 54 and 100—apprenticeships to a cordiner and saddler respectively, 1555 and 1557.

[58] See Prot. Book of Sir Alex. Gaw (Scot.Rec.Soc. 1910), No. 65 (1547), Prot. Book of Sir John Cristisone (Scot.Rec.Soc., 1930), No. 3 (1519), Glasgow Prot. IV., 1101 (1531).

to be diligent and attentive to business; to be respectful and obedient to his master; and to conduct himself with honesty and decency on his master's premises.[59] Where a regular indenture had been entered into with cautioners and a clause of registration, there was some doubt as to whether an apprentice could be required under sanction of imprisonment to find further caution to return and continue with his master—as, at common law, servants might be compelled. Lord Fraser, however, considered [60] that the authorities warranted a complaint at the instance of the master in respect of an apprentice, as well as in respect of a servant. The Employers and Workmen Act, 1875,[61] provided a statutory sanction of imprisonment to compel the continued service of an apprentice bound without premium or with a premium not exceeding £25. A master could reclaim an apprentice who enlisted in the Army [62]; and likewise, unless the apprentice had previously served at sea, the master could reclaim him if he had volunteered or had been impressed for service with the Royal Navy.[63] The enticing away, harbouring or injuring of an apprentice, if loss of service resulted, constituted actionable wrongs against the master of the apprentice.

The main duty of the master towards his apprentice was always to teach him his whole trade. An apprentice could legitimately object, and indeed have his contract annulled, if he were not taught a trade properly, or if he were required to undertake work outside the trade which interfered with proper instruction.[64] It was incompetent for a master to assign his apprentice to another, though within reasonable limits he might delegate the task of instructing an apprentice to a properly qualified workman.[65] The Act 42 Geo. 3, c. 73, was passed in 1802 " for the preservation of the health and morals of apprentices and others " employed in cotton mills and certain other factories. This Act, though its provisions were all too seldom enforced, was the forerunner of comprehensive legislation requiring factory owners to improve the conditions of factory workers generally, and of young persons in particular.

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[59] See Mor.Dict., s.v. "Apprentice" and unreported cases cited by Fraser, 1st ed., ii.599 *et seq.*

[60] 1st ed., i.394, 597.

[61] 38 & 39 Vict. c. 90, by ss. 6 and 12.

[62] *Wrights* v. *Lumsden* (1742) Mor. 586—procedure was subsequently regulated by the Mutiny and Army Acts.

[63] *Chalmers* v. *Napier* (1778) Mor. 594; *Cunningham* v. *Simpson & Home* (1793) Mor. 600.

[64] See cases cited in Fraser, 3rd ed., 360, such as *Carswell* (1794, not rep.), where the contract was annulled when a mason confined his apprentice to hewing, and did not engage him in building.

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[65] *Edinburgh Glasshouse Co.* v. *Shaw* (1789) Mor. 597—discussed in Fraser, 3rd ed., 362, note a.; *Gardner* v. *Smith* (1775) Mor. 593.

THE GROWTH OF THE CRIMINAL LAW *

IT is I suppose some forty-four years ago that, as a law student, I joined your Society and took part in its discussions as a member. Since then much water has flowed under the bridges, and the membership and possibly the interests of your Society have undergone many changes. Nevertheless, that link with the past adds pleasure to the privilege you have conferred by inviting me to deliver the Inaugural Address on this occasion.

The subject on which I am to speak tonight is "The Growth of the Criminal Law." By "growth" is not, of course, meant the accumulation of heterogeneous statutory offences which has characterised the present century. I refer rather to the gradual development of the common law of crime through the power of the Supreme Court to declare criminal any conduct which tends to corrupt public morals and to injure the interests of society—as claimed in the second of the *Greenhuff* cases in 1838 and as has often been exercised both before and after that date. The somewhat remarkable power which the Supreme Criminal Court has claimed and exercised has no doubt its historical as well as its theoretical explanation. If at a sufficiently early stage in our history the criminal law had been codified with the precision of a modern Act of Parliament, the only question for the court would have been whether the particular conduct in the instant case was covered by the words of the statutory code. It would not then have been possible for the court to say that conduct which was wicked and harmful to the public was deserving of punishment unless such conduct fell within the words of the code. In fact, however, there never was anything approaching such a statutory code. From the beginning it seems to have been left very much to the court to decide whether the conduct in the particular case was punishable or not. In the course of time different classes of crime came to be defined by practice. This classification depended in part on the subject-matter—as homicide, dishonesty, or sex behaviour form different subject-matters. What is important for present purposes is that within each separate subject-matter it became necessary to define the kind of conduct deserving of one or other of the many special penalties, of which the death penalty was perhaps the most enduring. It is not difficult to see why conduct attracting the death penalty should in general have received a restrictive definition. Then arose the problem of what conduct not falling within the restricted definition of a capital crime, but approximating to it, should merit some milder punishment. Before I endeavour to enlarge on this theme it is desirable to say something about the old justice-court as it existed before it was reformed and remodelled to its present shape by the legislation of Charles II in 1672.

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* An address given to Edinburgh University Scots Law Society on November 4, 1957.

Until 1671 the justice-court had usually been presided over by a justice-depute appointed by the justiciar or justice-general. Sir George Mackenzie, who in his youth had acted as a justice-depute in that court, placed no great faith in the impartiality of its decisions. He makes it plain enough that before he could rely on any decision as forming persuasive authority he would need to know something of the personalities of the parties involved in the prosecution. More than a century later Hume roundly condemned the justice-court of the seventeenth century as hardly maintaining its rank as a sovereign, or even an independent court of law. It seems plain from the records that the justice-deputes held their appointment during the pleasure of the justiciar and that they were little more than the handmaids of the Privy Council sitting in secret in Holyrood House. The old justice-court may perhaps be regarded as having presided over the dark ages of our criminal law. Nevertheless, we must accept Mackenzie's view that a whole tract of its decisions in the same sense would be infallibly binding as law, for any conduct is criminal when it is shown to be the custom to punish it in the criminal courts.

In his *Laws and Customs of Scotland in Matters Criminal*, published in 1678, Mackenzie asserts that the law of God is the first fountain of our criminal law, and the place which he assigns to the civil law is that it was followed only when our own statutes or customs were silent or deficient. It seems clear that one broad result of the Reformation of the sixteenth century was that the sins which had been punished in the courts of the pre-Reformation Church came to be prosecuted as crimes in the old justice-court. Some of the sin-crimes, if I may call them so, appear to have been based directly on Biblical injunction: "Thou shalt not suffer a witch to live." They seem to have been prosecuted with all the fervour of religious perversion for fear lest the wrath of God should be visited on a community which permitted such abominations to continue in its midst. It is neither easy nor profitable to try to understand the psychology of the ancients in relation to sin-crimes, though some quaint points of view emerge. Witchcraft, blasphemy and heresy, which had been punishable by death, have simply disappeared from the calendar of crime. Adultery has been relegated to the status of a civil wrong. In Mackenzie's day, however, bigamy and adultery were both crimes. At that time the question had been mooted: Why should bigamy be treated as a separate crime punishable only by imprisonment, seeing that the parties to such a marriage usually lived together openly in notour adultery which was punishable by death? The answer recorded by Mackenzie was that bigamists are deserving of lenient treatment because they at least show some respect for the law by going through a ceremony of marriage before living together.

The crime of incest has had a somewhat curious history in early times. In the courts of the pre-Reformation Church there seems to have been some doubt about the brother-sister relationship. According to Mackenzie the Roman Catholics did not regard that relationship as incestuous because it was permitted in the beginning. That view is not unintelligible. It follows logically from the starting conditions in the Garden of Eden that the second generation of mankind must have been the fruit of the brother-sister relationship—unless indeed Adam or Eve could be regarded as being the parent as well as the grandparent of that generation. The doubt which prevailed in the old church courts may throw some light on the intention of the statute of 1567 as merely directing attention away from Genesis towards the eighteenth chapter of Leviticus, rather than as for the first time enacting a new statutory offence. It is well known that the relationships described in Leviticus have been interpreted as including relationship by affinity in the same degrees as relationship by blood. What was not always so clear was how relationship by affinity was constituted. It was of course constituted by marriage duly consummated. But what of an unconsummated marriage? There is a series of cases—not perhaps amounting to what Mackenzie would call a whole tract of decisions—in which the conjunction of bodies irrespective of marriage was treated as being sufficient to create relationship by affinity. In the *Selected Justiciary Cases* recently published by the Stair Society there is recorded the case of George Sinclair, who in August, 1628, was found guilty and sentenced to death by drowning. The only capital crime charged—of which he confessed guilt—was that while acting as teacher of a school for girls he shamefully gave the use of his body to two sisters being his pupils "thereby committing notour and manifest incest." The learned editor has appended this note: "The use of the word incest for seduction does not occur again." It is clear that the editor is mistaken in regarding the case as being one of seduction. It is one of the capital crime of incest where the underlying theory must have been that the teacher by having intercourse with one sister thereby became the brother-in-law of the other sister. Hume's view is that the series of cases of which Sinclair's case is one manifest a tendency of the seventeenth century to treat such crimes with severity. Notwithstanding that passing tendency it is I think true that the general overall tendency has been to restrict the definitions of crimes which are capital.

Of all crimes in the calendar that of homicide or slaughter has probably had the longest and most interesting history. Its problem has been to distinguish degrees of blameworthiness in the killing of a human being. In very early times blame seems to have been determined by reference to easy rules relating to externals. Thus, if the man was killed by a kick of the horse's forefoot the rider was liable to pay Cro or Galnes, but if killed by the horse's hindfoot the rider was free from liability. It is not clear at what stage in history the Celtic remedies of Cro and Galnes came to be superseded by kinboot and assythment. Eventually, however, if the slayer declined to pay a satisfactory assythment the only remedy open to the next-of-kin was to bring a private prosecution in the criminal court, where it was essential for them to establish that the slaughter was criminal. It was only by this means—by the practice of bringing private prosecutions for recovery of assythment—that a line could in those days be drawn between slaughters that were criminal and slaughters that were not. Unfortunately the recorded cases are interesting for their facts rather than helpful with their law. One case, recorded in the *Selected Justiciary Cases* already mentioned, may be referred to. On March 2, 1632, Thomas Chatto, indweller in Kelso, unsuccessfully brought a prosecution against William and Robert Hangetside for being art and part in the slaughter of his son. It appears that a bonspiel at the golf had been in progress in the Kelso kirkyard. One may perhaps figure the unfortunate boy sitting on the tombstone peaceably watching the game. He met his death according to the words of the libel by reason of " ane deidlie straik with ane golf ball strucken out with ane golf club under his left lug." The prosecution failed because it had to be admitted that neither of the accused had strucken the deidlie straik. Had the fact been otherwise none can say what the result would have been. Nevertheless the case must be regarded as the distant but common ancestor of the growing class of actions of reparation for negligence in the playing of ball games.

When Macdonald first published his book on criminal law in 1866 he included under culpable homicide the case where death resulted from negligence. Some at least of the instances he figures would today be treated merely as civil wrongs, for the tendency has been to emphasise the high degree of culpability or blameworthiness required for the crime. Similarly, some of the cases which Macdonald dealt with as murder are today dealt with as culpable homicide—for example, where death follows on an illegal abortion. Further, since 1866 the effect of provocation in reducing the crime from murder to culpable homicide has been enhanced. As the result of quite recent decisions the husband who kills his wife in the heat of indignation on learning of her adultery is guilty of culpable homicide rather than murder. Finally the doctrine of diminished responsibility was introduced by Lord Deas in the year following the first publication of Macdonald's book. It is true that some two hundred years earlier Mackenzie had suggested some such doctrine. It was arguable, he said, that since the law grants total impunity to such as are absolutely furious, it should, by the rule of proportions, lessen and moderate the punishment of those who, though not absolutely mad, are hypochondriac and melancholy to such a degree that it clouds their reason. That the idea of thus tempering the wind to the shorn lamb should have emanated from men who bear an especial repute as hard and even harsh administrators of the criminal law might strike one as odd, the Bloody Advocate Mackenzie—and Lord Deas of whom you may remember the following anecdote is told. In the days when the capital sentence was in less short supply than it has been since 1887, two old lags were ascending from the cells to the dock for trial. The first, after looking over the top, turned to his companion and was heard to say in a tremulous whisper—" My Goad, Jock! It's daith this time—auld Deas is on the bench."

What we have been saying is that there has been a gradual tendency to restrict the definition of murder in favour of culpable homicide and to restrict the definition of culpable homicide in favour of civil wrongs. Acts which once were murder have tended to become culpable homicide and acts which once were culpable homicide have become civil wrongs. There has been a drift from the higher to the lower category. What I want now to consider is the case where the crime—murder or culpable homicide—is incomplete only because the victim has not died. You are familiar with the section in the Criminal Procedure Act of 1887 which provides that any attempt to commit an indictable offence is in itself an indictable offence. Culpable homicide is an indictable offence but so far as I am aware no one has yet been indicted for attempted culpable homicide. The position was otherwise with regard to murder. Long before 1887 people had been convicted of attempting to do murder when they failed to kill their victim. It was I think largely in relation to attempted crime that the power of the court to declare criminal any conduct which tends to corrupt public morals and to injure the interests of society, as claimed in the second *Greenhuff* case in 1838, came to be exercised. Let me look for a moment at the position of attempts to commit crime.

Where violence was used in attempt to commit the capital crimes of murder, rape or robbery, resort was often had to the expedient of charging assault as the crime and asserting it to be aggravated by intent to commit the capital crime. In such cases the court was not being asked to declare a new crime but only to affirm that an old crime might be aggravated in a particular way. There is little or no difference between assault with intent to commit a major crime and attempt to commit the major crime. The real difficulty began where the accused had committed no known crime as a means of attaining his ultimate aim. The difficulty was solved sometimes in one way and sometimes in another. In the one case the prosecutor charged attempt to commit the crime—say murder. In that case he had to specify facts showing that the accused had advanced from the stage of preparation to that of perpetration; and it is needless to say the point when preparation ends and perpetration begins raises a problem of some nicety. In the other case the prosecutor might assert that the facts libelled constituted a new crime and ask the court so to hold. I give one illustration of what I mean. In 1818 Roderick Dingwall wanted to poison his wife. For that purpose he asked his doctor to supply him with arsenic, to visit his wife who was ill, and to advise her to take the medicine her husband should bring. The doctor only pretended to comply with the request. Dingwall was charged under three heads. The court held that the facts libelled did not amount to an attempt to murder or to feloniously procuring poison with intent to murder. The third head of the charge, however, was sustained, namely that of attempting to induce the doctor to enter into a conspiracy to commit murder by furnishing poison for that purpose. It seems plain that the court there declared a new crime of attempting to induce another to enter into a conspiracy to commit a crime. Only some five years earlier the court after repeated argument had sustained a charge of entering into a conspiracy to raise wages by criminal acts of violence where no such acts had followed. These cases form practically the whole law relating to conspiracy in Scotland. By the exercise of its power to declare new crimes the court seems to have established that it is criminal to enter into a conspiracy to do a criminal act, or to attempt to induce another to enter into such a conspiracy.

Let us turn for a moment to consider the crime of theft, which in its graver instances was at one time punishable by death. It is, I think, possible to detect a tendency of the common law to restrict or limit the definition of theft in a number of directions. Mackenzie, for example, appears to have thought that a man might steal a thing which he held in trust—that is, on a title of ownership—and he expressly says that breach of trust is an aggravation of the theft. In the later development of the common law it became clear that a trustee who appropriated the thing which he held in trust was guilty only of the minor and non-capital crime of breach of trust and embezzlement. He could not theftuously take the thing which he held as owner. The idea of the taking of the thing has its own niceties. It was not sufficient to move the thing in the place where it was—it had to be removed from that place. Thus, if I slaughtered my neighbour's ox in the stall where it stood, I committed only the minor crime of malicious mischief, but if I removed the ox into the yard and then slaughtered it I was guilty of the major crime of theft. As will be seen from that example theftuous intent did not involve an intent to enrich oneself, but it did come to involve an intent to deprive the true owner of the thing itself. This conception of intent in theft appears to have excluded the case of *furtum usus*. Hume mentions the instances of the taking of a boat or a plough with intent to use and then return, as not amounting to theft or indeed to any crime at all. In such cases there is no intent to deprive the owner of the thing itself. Finally, it is noteworthy that in the development of the law prior to 1887 the court seems to have been reluctant to recognise as criminal attempts at theft and attempts at some other crimes such as fraud.

Subsequent to 1887 the law has perhaps taken a somewhat different trend. The Criminal Procedure Act of that year provided as already mentioned that any attempt to commit an indictable offence should itself be an indictable offence. The Act appears to have given fresh impetus to the prosecution of attempted crime. I mention only one such instance here. In 1932 the court sustained a conviction of attempt to steal when it was proved that the accused put his hand towards another man's pocket with the object of stealing money therefrom, but it was not proved that there was anything in the pocket. It seems clear that the conviction would not have been sustained before 1887, so that that offence of attempt to steal must be regarded as being statutory rather than as an instance of the development of the common law. The position of *furtum usus* is rather different. When in 1926 the court held it to be criminal to take a motor-car to use on the street and then to return it, some advance was, I think, made on the older law which, as already stated, regarded such a taking of a boat or plough as not being criminal.

I come now to the last instance of the development of the law which I intend to mention. As you know, " Falsehood " has been regarded as a generic title which includes many separate crimes. The one I have in mind is falsehood by writ or forgery. It is undoubtedly the case that forgery meant the fabrication or falsification of a writing which was then used towards the prejudice of someone. How the law came to develop under this head cannot be explained without some reference to the old form of indictment in use before 1887. You remember that the major premiss of the old indictment asserted that something was a crime—whereas forgery is a crime, nevertheless you are guilty of it in respect that you did this, that and the other. Under an indictment in that form the accused could be convicted only of forgery and of no other crime. Accordingly, if the prosecutor failed to prove that the accused had fabricated or falsified the writing, but only proved that he had used the writing knowing it to be false, the verdict had to be one of not guilty. Part only of the crime charged had been proved. In order to obviate that hazard it became the practice for the prosecutor to frame the major premiss in this way—whereas forgery as also the uttering of documents as genuine knowing them to be false are crimes. Under this form of indictment the accused could be convicted either of the complete crime of forgery or of the mere uttering as genuine according as the facts were proved. The court, of course, had to and did affirm that uttering as genuine was in itself a crime. This is, I think, an outstanding example of one part of a crime being declared to amount to a crime in itself. It is perhaps not so remarkable that in later times and especially after 1887 the emphasis has shifted to uttering as the principal crime and forgery has dropped into the background. What has always struck me as being the best instance of the growth of the common law to meet new situations occurred in relation to the printing of false bank notes. Skilful but wicked persons printed the false £1 notes and then sold them for 5s. each to a middleman who in turn sold them for 10s. each to retail distributors who in turn passed them off to the public as genuine. It was only the small man—the distributor—who uttered the notes as genuine. The big man uttered them for just what they were, *viz.*, false bank notes. What could be done to stop such conduct? The charge of uttering as genuine could not easily be converted into one of uttering as false. Accordingly, a new crime was discovered, namely, that of vending false bank notes at less than their face value. In this instance as in many others the common law discovered and punished wicked and harmful conduct before such conduct was struck at by statute.

I have now come almost to an end of what I intend to say. Many theoretical and some practical jurists have taken the view that no conduct should be punished unless it had previously been declared unlawful. *Nulla lex nulla poena.* There is something to be said for that view. A man should be in a position to know at the time he acts whether or not what he is about to do is criminal. How can that ideal be attained? Not very well I think by Act of Parliament. I suppose there are few men today who are always in a position to say whether what they are about to do is struck at by the provisions of some Act of Parliament or statutory regulation; or who, if they did know, could foresee how these provisions might be interpreted. It is, I think, easier for a man to know intuitively whether what he is about to do is harmful to the public interest. In any event it appears to be the fact that over the wide field of human conduct it has been left to the common law to ascertain and to punish what is most harmful to the community. I hope I have now said enough to show how the common law has grown up, refusing to be confined within rigid definitions but always capable of dealing with new phases of wicked and harmful activities in an as yet imperfect world.

JAMES WALKER.

THE ROOTS OF A TREE[1]

THE last decade has seen in the literature of Scots law protest against the corrupting influence of English law. The English judges in the House of Lords have been criticised for their failure to appreciate and accord respect to the differences between Scots law and English law.[2] Professor Walker has asserted that "the baneful influences of Parliament and the House of Lords are steadily whittling down the qualities of reliance on principle and simplicity possessed by the native common law."[3]

The writer is not unsympathetic towards these endeavours to vindicate the distinctiveness of Scots law, but he ventures to suggest that the clock cannot be put back to pre-1707, nor even to the nineteenth century. Antiquarianism may be a hobby: it cannot be the badge of a living system of jurisprudence. In the long run the test of what is good is the test of social utility, and that applies to any system of law and the rules thereof. Emotion does not enter into it. Thus in "Is *culpa* amoral?"[4] the writer submitted that to equiparate *culpa* with negligence might well stultify the growth of Scots reparation. The better view was to consider negligence as a species of *culpa*, and to realise that morality no longer was an essential ingredient of a quasi-delict. This provoked a vigorous reply from Mr. W. A. Elliott, who in a most interesting historical survey sought to demonstrate that until the close of the nineteenth century "*Culpa* or fault was still considered to involve the moral element (in Erskine's words) of

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[1] "A man is shaped to beliefs long held however uncritically—as the roots of a tree that has grown in the crevices of a rock": Holmes J. in a letter to H. J. Laski—*Holmes-Laski Correspondence*, Vol. I, 580.

[2] For example, Smith, *Judicial Precedent in Scots Law*; Gibb, *Law from over the Border*; Walker, "Some characteristics of Scots law," 18 M.L.R. 321; Elliott, "What is *culpa*?" 66 J.R. 6.

[3] 18 M.L.R. 332.

[4] 65 J.R. 17.

'blameable omission or neglect of duty.'"[5] It would be surprising if the climate of thought had been otherwise. The writer's contention, however, was not what had been *culpa* in the past, but what in his submission it has been recently and is developing into, if only because of the tremendous change which has taken place in the structure of human society since Lord President Inglis quitted the chair of the First Division. No legal principles are eternal verities, either present or past.[6]

It is not a justification for conservatism to say "Scotland with her civil law tradition is a bridge between England and the Continent and let one pause before thoughtless destruction of a pillar on which it rests."[7] A facile answer is to vary the figure, for if Scots law is hermaphroditic how can it be fruitful? A bridge is not a bridge if those on it cannot get off at either end.

Much of the difficulty stems from thinking in abstract terms. There is no special magic, no magic at all, in "Scots law"; "*culpa*"; "negligence": a legal system acts, and can only act, through human beings and for and on behalf of human beings; its rules are the product of human thinking, and that thinking is always conditioned by the political climate of time and place. If this be true *une recherche du temps perdu* is futile. The fact is that Scotland as a political entity lost her identity with the Union of Parliaments in 1707, and there is good authority for the view that the Faculty of Advocates was considerably responsible for making the English House of Lords the ultimate Court of Appeal in civil matters. The result has been to destroy the identity of Scots law and in some branches to render it almost impossible today to restate the principles of the system in anything like a consistent and coherent manner.

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[5] "What is *culpa*?" 66 J.R. 6 at 21.

[6] Holmes J., *op. cit.*, 704. "It is amusing to see in the law how in a century what was thought natural and wholesome may become anathema—like rum and the lottery—but they generally are argued about as if the present view was an eternal truth."

[7] Elliott, *op. cit.*, 36.

The question is not whether the logical harmony of the system has been destroyed and the faith of Stair and Erskine abandoned, but whether there exists in Scotland an efficient system of law so far as the people are concerned. No law, far less Scots law, exists either for the intellectual gymnastics of academical lawyers or for the purse of practising lawyers, but for the benefit of the community. A legal system should not be esoteric, and primarily its interpreters are justified only to the extent to which they can interpret efficiently. A long time ago Holmes J. said: " Why people will pay lawyers to argue for them or to advise them, is that in societies like ours the command of the public force is intrusted to the judges in certain cases, and the whole power of the state will be put forth, if necessary, to carry out their judgments and decrees. People want to know under what circumstances and how far they will run the risk of coming against what is so much stronger than themselves, and hence it becomes a business to find out when this danger is to be feared. The object of our study, then, is prediction, the prediction of the incidence of the public force through the instrumentality of the courts." [8] He who is run down in Sauchiehall Street is not concerned with the question whether negligence is a tort or a logical application of *culpa*, but with when, where and how quickly may he be compensated. He who buys a silver watch in the belief that it is platinum has no reverence for Pothier, only a clamant desire to get his money back. What then is the task of Scots law and Scots lawyers? What is the path of Scots law?

Politics may be described as " the art of ruling the organised community " [9] and law as the means whereby the political end is achieved. Every legal question ultimately raises a political issue, and so " it is not superfluous to remind the lawyer that as a ' jurist ' he is but a technician whose most important task is to assist the lawmaker in the adequate formulation of the legal norms."[10] No system of law operates in a vacuum. The evacuation of Scotland would mean the disappearance of Scots law. To give a personality to Scots law is a felicitous form of speech but a disastrous habit of thought.

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[8] " The Path of the Law," *Collected Legal Papers* (1921), 167.

[9] Galbraith Miller, *Law of Nature and Nations* (Edin. 1896), 50.

The rules which in the aggregate are described as Scots law have for their function and justification the rôle of arbiters in the conflict of values which rages in the community of Scotland. These rules reflect and express judgments as to values which have been made by or on behalf of the community. When made by lawyers, directly or indirectly, the makers have been acting politically. Which values ought to receive legal protection is, of course, a question which is neither primarily nor exclusively one for lawyers *qua* lawyers. It is a question which affects the whole community and which will depend for an answer on the philosophy of life held by those who are within the community politically effective. In so far as judges make legal rules, such rules will reflect the views which they hold of the purpose and end of society. The difference between the Second Division in *Crichton* v. *Keir*[11] and the majority of the Second Division in *Steel* v. *Glasgow Iron and Steel Co., Ltd.*[12] is not of legal competence but of political belief.

Stair, because of his political beliefs, shaped Scots law as he did. His fundamental premises are: (1) that God has in His mind a plan for ruling the world including the regulating of human conduct; (2) men are rational beings and by use of their reason can discover God's plan. It follows that law consists of rules of conduct revealed by human reason as requiring to be obeyed, if man is to fulfil and develop himself in accordance with his nature. The perfect law of God must be supplemented by human law because men cannot be relied on at all times voluntarily to acknowledge, administer and comply with the dictates of natural law, which is the law of God. The function of human law is, therefore, to proclaim and to safeguard men's rights as declared by natural law. The origin of human law is the social contract which is the foundation of human society, " men's laws are nothing else but the public sponsions of princes and people: which, therefore, even by the law of nature, they ought and must perform," [13] for it is a cardinal principle of the law of nature that agreements are to be kept. The principles of social action are three: (1) obedience to God; (2) freedom; and (3) the capacity to enter into contractual agreements. These principles subsume the legal order in the community.

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[10] Kelsen, *Law of the United Nations*, preface to the second impression.

[11] 1 M. 407.

[12] 1944 S.C. 237, 1945 S.L.T. 70, and similarly between Lord Atkin and Lord Buckmaster in *Donoghue* v. *Stevenson*, 1932 S.C.(H.L.) 31, 1932 S.L.T. 317.

Hence law for Stair was a means to an end, not an end in itself. The shape of the legal system he was endeavouring to construct depended very much on what he conceived as the ends of law. He declares there are three ends: (1) the maintenance of society; (2) the security of property; and (3) the maintenance of commerce. A legal system is the bridge which links up the principles of social action with the " ends for which laws are made." [14] Such a system consists of deductions from these principles. Obedience yields obediential obligations, as between husband and wife, parent and child, restitution, reparation and recompense. Freedom yields personal liberty, and the capacity to own and dispose of property. Engagement yields obligations undertaken by agreement and by promise.

How then can these obligations be made legally effective? The answer which Stair gives is his real and lasting contribution to Scots law. " The formal and proper objects of law are the rights of men. A right is a power, given by law, of disposing of things, or exacting from persons that which they are due," and " Obligation is that which is correspondent to a personal right . . . and it is nothing else but a legal tie, whereby the debtor may be compelled to pay or perform something to which he is bound by obedience to God, or by his own consent and engagement." [15]

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[13] *Institutes* I. 1.15.
[14] *op. cit.* I. 1.18.

Hence reparation is the obediential obligation to God and consists in repairing the damage caused to another " by putting him in as good a condition as he was in before the injury." [16] The right which is enforceable is a right which the law of nature gives and which it is the task of human law to enforce. The several rights which Stair mentions are " life, members and health," " liberty," " fame, reputation and honour," " content, delight and satisfaction."

Erskine's contribution was that of method. Erskine had the great gift of lucid exposition, and he demonstrates how the categories and tools of the civil law could be used in Scots law. He identifies reparation with the Roman obligations arising *ex delicto* and *quasi ex delicto* and for the first time there clearly emerges the concept of *damnum plus culpa* which is believed to be the basis of Scots *quasi-delict.*[17]

In such a context and in the shadow of Stair, *culpa* could not avoid a moral content. But the writer's submission is that the phrase *damnum plus culpa* has no intrinsic merit. If *culpa* be the mainspring of the law of quasi-delict—and the latest edition of Glegg on *Reparation* stoutly proclaims this—then it should never be forgotten that *culpa* is only a verbal tool, not a sacrament. To identify *culpa* with *negligence* is to limit the former unnecessarily.

The man in Sauchiehall Street does not care whether his claim for damages is morally justifiable or not. It may well be that, for the moment, in matters of practical application the circles of *culpa* and negligence coincide, but that need not always be so. Scots law, if it has not already done so, may develop beyond the point of coincidence. It will not do so if those who teach, administer and practise it become the servants of a technical jargon.

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[15] *op. cit.* I. 1–22.

[16] *op. cit.* I. 9.2.

[17] *op. cit.* III. 1.13.

The immediate purpose of reparation is to restore to the victim what he has lost in so far as money can do so; the accent is on compensation. Provided the delinquent is legally liable his moral state is irrelevant. Of course, to the extent to which the legal rule states the circumstances under which delictal liability emerges it may be said that a moral evaluation has been made, but there need be no necessary connection between the value-judgment of the community and moral fault on the part of the delinquent.

What every legal system must guard against is that its methodology may become its master and cause its inanition.

Such has been the technical progress in the manufacture of motor-cars, combined with the assumption steadily being realised in fact, that the possession of a motor-car is a natural and inalienable right, aggravated by the tremendous growth in commercial motor-vehicle transport, and that the law of negligence is no longer capable of providing a satisfactory solution to the problems created by motor-car accident cases. In most running-down cases which are litigated not only could the question—who was negligent?—almost just as well be answered by the toss of a coin, but the legal process used is akin to the employing of a gigantic steam-hammer to crack a non-existent nut. Again, in these days of insurance cover " juries are only too well aware that the driver of a motor-vehicle is in substance only a nominal defendant and that behind him stands an insurance company endowed with ample funds. No wonder, then, that the defendant's responsibility (and the assessment of damages) are not weighed with meticulous attention to impartiality. In the result there has been a steady rise in the standard of care exacted from defendants to a degree which makes the distinction between negligence and strict liability often almost illusory. Despite the ' conspiracy of silence ' concerning insurance, juries are well aware of the realities of the situation and pay scant heed to exculpatory pleas by defendants, in the knowledge that the deep pocket of insurance companies will ultimately defray the cost of compensation." [18]

A pertinent question is: What is the cost to the community of maintaining and administering the present law, and who benefits?

Sooner or later the development will be to a form of social insurance. For the moment the writer's plea is that Scots lawyers should not prevent Scots law from measuring up to the needs of the community by adherence to a verbal formula.

Error provides another challenge. Professor Smith and the writer have endeavoured to show elsewhere that all is not well with the doctrine of error as stated in textbooks and found in the reports. For example, does innocent misrepresentation form part of Scots law? The writer has argued that it does not. *Per contra* Professor Smith states "Dicta and express decisions may be cited to support the view that reduction will be granted if a contract has been entered into by one party under the influence of collateral error induced by innocent misrepresentation of the party maintaining the bargain: In *Westville Shipping Co.* v. *Abram Steamship Co.*[19] and *Ritchie* v. *Glass*[20] alone is the problem seriously considered." [21] It could be that the view of Professor Smith is correct, but in a sense it does not matter which view is correct provided it can be said with some certainty that in Scots law there does exist an intelligible doctrine of error. The danger is lest, by a slavish adherence to not wholly understood dicta of the past coupled with an uninformed borrowing of English habit of thought, the present confusion in Scots error may become more confounded.

There is no merit in law of the view of the early Christian Fathers that the golden age is in the past. Professor Smith has well said that "Scots law is fundamentally a deductive system," [22] and no doubt Lord Dunedin relied on that fact when he sought to repudiate the asseveration by Dr. F. P. Walton that Scots law was " first and foremost a system of case law " [22a]; but a deductive system can only function from a set of principles, and it would be futile to argue that the principles of Stair are adequate to the needs of present-day and future Scotland.

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[18] Fleming: "Accident Law and Social Insurance," the quotation is with the permission of Professor J. G. Fleming taken from an inaugural lecture delivered at Canberra on October 3, 1956.

[19] 1922 S.C. 571, S.L.T. 452.

[20] 1936 S.L.T. 591.

[21] 71 L.Q.R. 516.

It is tempting to say with Professor Walker, " The question whether Scotland could have managed without appeals to the House of Lords is to my mind conclusively answered by the case of criminal law." [23] Implicit in this observation is the statement that the English Law Lords are and have been the guilty men. It is doubtful whether that is so. For a long time now two of the Lords of Appeal have been Scots lawyers and, if blame there be, they must share it. Professor Walker also says, " The decision in *Dumbreck* right or wrong on its facts . . . subverted a principle of Scots law and replaced it by rules of English law." [24] That may be so but Lord Dunedin not only gave an exposition of the categories of invitee, licensee and trespasser which has become famous, but twice on the same page asserted the identity of Scots with English law.[25]

Professor Smith has deplored the fact that in *Donoghue* v. *Stevenson* [26] counsel conceded that there was no difference between Scots and English law as to the instant case.[27] Perhaps counsel were not aware of the dispute then raging in England as to the status of negligence, although the respective senior counsel, the late Sir George Morton, and Lord Normand, then Solicitor-General, could scarcely be said to lack experience; yet Pollock on *Torts* and Beven on *Negligence* were referred to in argument. The two Scots

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[22] *Judicial Precedent* 103.

[22a] *Judicial Precedent* 15.

[23] 18 M.L.R. 336.

[24] *op. cit., loc. cit.*

[25] 1929 S.C.(H.L.) 51, at 59, S.L.T. 242.

[26] 1932 S.C.(H.L.) 31, S.L.T. 317.

[27] *op. cit.* 93, n. 52.

Law Lords, Lords Macmillan and Thankerton, were of great experience in both systems of law, and neither protested. Indeed, if anything, they approved of the concession and Lord Macmillan did so emphatically.[28]

In the nowadays indefensible decision in *Cameron* v. *Young*[29] the only speech delivered was that of Lord Robertson (the successor of Lord President Inglis in the Chair of the First Division) who reversed a unanimous decision of the First Division. As for *Inland Revenue* v. *Glasgow Police Athletic Association*[30] it is a matter of opinion whether "the directions given by the House are profoundly unsatisfactory, if not completely unworkable,"[31] but Lord Normand, who delivered the leading speech, did not think so. In any event, what is an English lawyer to think, having read the speech of Lord Watson in *Income Tax Special Purposes Commissioners* v. *Pemsel*[32]?

It is true that "as a whole Scots law is *thoroughly hybrid and selective*."[33] It is equally true that in the last one hundred years (which are the years that matter) the selection has been from English law. It is also true that the selecting has been done by the judges (when not done by Parliament) and many of those judges have been Scots lawyers. Probably they realised that to throw a *cordon sanitaire* round Scots law is to sound its death-knell.

It may be that the system of legal rules described as Scots law is fast losing the identity which it had in the nineteenth and earlier centuries. What does that matter if the succeeding rules are tolerably efficient and satisfy the community? Selection *per se* is not an evil; unintelligent, haphazard selecting may well be. If there be a duty to see that the selecting is intelligent, then that duty lies with the lawyers of Scotland. Faults of omission cannot be placed on other shoulders. That duty will be ill-discharged if we indulge in ancestor-worship. A good beginning would be (for all practical purposes) to burn all textbooks and reports prior in date to the first volume of Rettie.[34]

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[28] 1932 S.C.(H.L.) 31 at 63.

[29] 1908 S.C.(H.L.) 7, 15, S.L.T. 976.

[30] 1953 S.C.(H.L.) 13, S.L.T. 105.

[31] Walker, *op. cit.*, 344, n. 59.

[32] [1891] A.C. 531.

[33] 18 M.L.R. 326 [italics supplied].

J. J. Gow.

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[34] This is not a heresy of and peculiar to the writer; it had its origin in the College of Justice: *cf.* Holmes, *Path of the Law*, *loc. cit.*, 169.

MODERN SCOTS "RUNAWAY MARRIAGES"[1]

Historical

THE Scottish "runaway marriage" is once again making its contribution to Private International Law. It was Lord Hardwicke's Act of 1753[2] which first brought notoriety and profit to the Border village of Gretna Green. That Act had ended in England the "Fleet Marriage," or clerically celebrated clandestine marriage as well as the marriage *per verba de praesenti,*[3] but the Act did not extend to Scotland since, according to Sir W. Wynne, "By the Act of Union the state of religion is not to be touched,"[4] and, although efforts were made to introduce corresponding legislation in Scotland, this was not enacted.[5] In Scotland marriage might still be constituted by the mere interchange of present consents. English couples who had their reasons for marrying swiftly and secretly soon began to take advantage of this difference between the laws of the two countries and Gretna, and other places on the Border, became the centres of a prosperous marriage business.[6] The journey to Scotland was expensive and such marriages were much fewer in number than those formerly celebrated in the Fleet Prison and elsewhere in London. It became, nevertheless, quite a fashionable thing to marry in this way, and one writer describes it as "almost a reproach to a young lady to have been married and not to have been thought worth stealing."[7] Although the couples were usually English, a few names of foreigners appear in the Registers of Gretna Green, including those of Carlo Ferdinando Borbone, Principe di Capoa, and Lorenzo Sforza, Duce Sforza Cesarini di Roma.[8] In the present context the interest of these marriages lies chiefly in the fact that they were held to be valid marriages by the English courts. It is true that Lord Mansfield expressed some doubt as to whether these marriages were not invalid as a fraud upon English law,[9] but this approach was not adopted when the question came for decision in *Compton* v. *Beurcroft*.[10] This case was later construed as establishing that Lord Hardwicke's Act was purely territorial in its operation. Referring to it in *Harford* v. *Morris*[11] Sir George Hay remarked that "the Act of Parliament did not put any restraint upon English subjects being married in Scotland, with respect to the consent of parents." The same view was taken in *Middleton* v. *Janverin*,[12] which added the rider, however, that the marriage had to be a valid one according to the

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[1] The writers gratefully acknowledge the assistance given to them by the Registrar-General for Scotland, the Registrar of the Faculty Office of the Archbishop of Canterbury, and the solicitors concerned with the cases discussed. The opinions expressed, however, are those of the writers alone.

[2] 26 Geo. 2, c. 33.

[3] W. S. Holdsworth, *History of English Law*, Vol. XI, p. 609.

[4] *Middleton* v. *Janverin* (1802) 2 Hagg.Con. 437, at p. 448.

[5] Lord Fraser, *The Law of Husband and Wife*, 2nd ed. (Edinburgh, 1878), Vol. I, p. 177, footnote, and Vol. II, p. 1302.

[6] "Claverhouse," *Irregular Border Marriages* (Edinburgh, 1934); David C. Herries, "The Gretna Green Marriages in the Legal Aspect," *Trans. of Dumfriesshire and Galloway Natural History, etc., Society*, 3rd Series, Vol. XIV, p. 10.

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[7] Burn, *History of the Poor Laws*, pp. 232, 233, cited by Holdsworth, *supra*.

[8] E. W. J. M'Connel, ed., *Marriages at Gretna Hall* (Scottish Record Society, 1949), pp. 12 and 60. Prince Borbone and his Irish bride, Penelope Caroline Smythe, appear to have gone through at least five different marriage ceremonies in an effort to contract a marriage valid despite the prohibition of the Prince's brother, Ferdinand II of Naples. Shortly after the Gretna Green ceremony the couple applied at Doctors' Commons for a licence to marry according to the forms of the Church of England, and were met with a *caveat* on the part of the Sicilian Ambassador. "The King's Proctor," says one writer, "urged that by decrees of the Sicilian Kingdom no valid marriage could be contracted by a Prince of the Royal Blood without the consent of the reigning Sovereign. This contention was allowed by the Court of Canterbury and the licence refused. The banns of marriage were then published in the ordinary way, and were at once forbidden, but failing 'just cause,' as the parties did not come within the limits of our 'Table of Kindred and Affinity,' the ceremony, for what it was worth on the Continent, was once again duly performed in the Church of St. George, Hanover Square, London."—*Irregular Border Marriages* (*supra*), p. 109. This case is also referred to in Arthur S. May's *Marriage in Church*.

[9] *Robinson* v. *Bland* (1762) 2 Burr. 1077 (*obiter*); see also *Ruding* v. *Smith* (1821) 2 Hagg.Con. 371, 373, and the very learned notes by Story, *Conflict of Laws*, 7th ed., p. 170, footnote 8.

[10] (1769), reported in a footnote to *Middleton* v. *Janverin*, *supra*; *cf.* the Irish case of *Steele* v. *Braddell* (1838) 1 Milward's Irish Eccl. Reports 1.

[11] (1776) 2 Hagg.Con. 423.

[12] *Supra*.

lex loci celebrationis.[13] The importance of Gretna Green as a resort for English couples was greatly diminished by the Marriage (Scotland) Act, 1856, which provided that "any irregular marriage contracted in Scotland by declaration, engagement or ceremony shall be invalid, unless one of the parties had at the date thereof his or her usual place of residence there, or had lived in Scotland for twenty-one days next preceding such marriage." Finally, the Marriage (Scotland) Act, 1939, abolished irregular marriages and the opinion was widely held that the Scottish runaway marriage had passed into history.

The modern problem

Events, however, have belied this opinion. Couples domiciled abroad have continued to come to Scotland with a view to evading the requirements of their domiciliary laws, particularly that of parental consents to the marriage of minors, which is unknown to Scots law. Until recently they experienced no difficulty in effecting their purpose, since the view taken by successive Registrars-General (following, it may be said, the guidance of writers of authority [14]) has been that the requirements of foreign domiciliary laws are irrelevant in the case of marriages contracted in Scotland.[15] The number of such "runaway" marriages, particularly between English minors, is said to have increased in recent years,[16] and has attracted the notice of various bodies, including Parliament [17] and the General Assembly of the Church of Scotland. The General Assembly appointed a committee to examine the matter and, after considering its report, the Assembly, by a Deliverance issued in May 1957, pressed "for such amendment of the marriage law of

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[13] *Cf. Dalrymple* v. *Dalrymple* (1811) 2 Hagg.Con. 54; *Bell* v. *Graham* (1859) 13 Moo.P.C. 242.

[14] Lord Fraser, *supra*, Vol. II, p. 1299, and the cases there cited; G. R. Gillespie, note to Bar's *Private International Law*, 2nd ed. (Edinburgh, 1892), p. 373.

[15] *Runaway Marriages*, 1954 S.L.T. (News.) 217.

[16] Report of the Committee on Church and Nation of the Church of Scotland (May, 1957), p. 329. This may be merely supposititious, for no figures are at present available.

[17] House of Commons Debates, Vol. 570, cols. 1013–1014.

Scotland as will prevent it being used by the nationals of other lands to circumvent the marriage law of their own countries." [18] It is the purpose of this article to examine this problem as it is presented in the existing law of Scotland, to consider whether the amendment of the law is necessary or desirable and, after considering the solutions adopted in other countries, to suggest a possible approach to the problem in keeping with the existing law of Scotland.

The recent Scottish cases

In a number of recent cases the parents of foreign minors have sought to interdict their marriage in Scotland on the ground that impediments to the marriage existed under the personal law of the minors. In the *Goldsmith-Patino* case James Goldsmith, who resided in France but whose domicile seems to have been English, desired to contract a marriage with Isabel Patino, the minor daughter of Antenor Patino, a Bolivian national, domiciled in France. The girl's father had not given his consent to the marriage, as required by Article 148 of the Code Civil. The couple moved to Scotland with the intention of marrying there. Proposing to marry in the office of a registrar, they gave to him notice of their intended marriage under the Marriage Notice (Scotland) Act, 1878. The father then stated objections under section 10 of the Act. He stated that by the laws both of France and Bolivia his daughter, being under the age of twenty-one, could not marry without his consent, which he withheld. She was accordingly legally incapax and disqualified to give such consent as is necessary for marriage within the meaning of section 10. He also stated that his daughter had been made a ward of the Chancery Division of the High Court of Justice in England on January 1, 1954, and that his daughter had no legal capacity to marry without the approval of that court, which had not been given. The registrar intimated verbally his intention to ignore these objections and Miss Patino's parents presented a petition to the Court of Session to interdict the Registrar-General and two registrars from issuing certificates of notice under the 1878 Act. Lord Birnam, upon averments similar to Senor Patino's statements in his Notice of Objections, granted interim interdict on January 5, 1954.[19] This decision was immediately appealed but, before argument was heard, the girl's father abandoned his objection for what have been described as "unconnected and non-legal reasons," and so the matter remained undecided.[20]

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[18] In 1958, the Assembly has reiterated this demand.

A similar problem arose in the *Desplanque-Revyn* case. Arthur T. Desplanque, aged eighteen and domiciled in Belgium, desired to contract a marriage with Yvonne A. M. Revyn, aged twenty-seven, and also domiciled in Belgium. The proposed marriage being opposed by Desplanque's parents, the couple proceeded to Scotland with a view to contracting marriage there. Having given notice in terms of the 1878 Act, a certificate of compliance was issued in due course by the registrar. The couple had proposed to marry in a Roman Catholic Church, but the ceremony was postponed pending an inquiry by the ecclesiastical authorities as to the circumstances surrounding the proposed marriage.[21] Desplanque's father then raised an action of interdict which was directed against the Registrar-General, five of the Edinburgh registrars, and the intended spouses, to prevent them celebrating the marriage. He explained that, with minor modifications, the French Civil Code had been adopted in Belgium and that, in terms of Article 148 of that Code as amended by Belgian law, a person who had not attained the age of twenty-one was unable to marry without the consent of his father and mother, or, in the event of disagreement, of his father. He further averred that the requirement of consent was not a formality of the ceremony of marriage, but was an essential part of the validity of the marriage of a minor. Without such consent, the minor, it was alleged, lacked the capacity under Belgian law to contract a marriage. On these averments Lord Cameron dismissed the petition *quoad* the Registrar-General, presumably in view of the terms of the Crown Proceedings Act, 1947,[22] but otherwise granted interim interdict, saying: "Mr. Reid . . . has maintained, and I think with force, that it is the general principle of law that capacity to contract marriage depends upon the law of the domicile of the contracting parties. Here it is averred that no marriage of a person under twenty-one against the will of his father or without his consent is valid by the law of the petitioner's domicile and that of his son. This is not a matter of mere formality according to the averments in the petition nor is it a matter which, as in certain of the cases to which reference was made by Mr. Reid, can be cured by the efflux of time." Lord Cameron then referred to the declaration of absence of legal impediments required by the Marriage (Scotland) Act, 1939, and continued: "It therefore appears to me that, upon what has been stated in this petition and submitted at the Bar, the petitioner has ground for his apprehension that his son may be about to make a declaration which would be untrue in fact in respect that there is, as he presumably knows, an effective legal impediment to his marriage. If, in these circumstances, any form of marriage were gone through by the parties, I think it is clear that it is open to argument that that would not be a valid and regular marriage according to the law of Scotland. Thus I think that there is a substantial legal question to try here, the solution of which may involve delicate and difficult issues of private international law. In addition Mr. Reid maintained that looking to the whole circumstances the balance of convenience lies in favour of at least postponing action on the part of these young persons until such time as the matter can be more fully investigated." It is understood that this case went no further and that the parties left Scotland and married in Eire.

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[19] But it is probably incompetent to interdict the officials of a Government Department in this way: Crown Proceedings Act, 1947, ss. 21 (1) (*a*) and 42 and the *Desplanque-Revyn* case, below.

[20] See the anonymous article, "Runaway Marriages," 1954 S.L.T. (News.) p. 217.

[21] Canon 1034 of the *Codex juris canonici* of 1917 requires the priest to exhort minor children to obtain the consent of their parents, and if the minors persist in their proposal to marry without informing their parents or in spite of their parents' opposition, not to go on with the ceremony without consulting the bishop; see the commentary in Naz, *Traité de Droit Canonique* (Paris, 1947), Vol. II, p. 306.

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[22] ss. 21 (1) (*a*) and 42.

In the *Elwes-Kennedy* case the problem was slightly different. Dominic Elwes, domiciled in England and himself of full age, wished to marry Tessa Georgina Kennedy, also domiciled in England, but an infant. The marriage was opposed by Miss Kennedy's father, who, by presenting an originating summons to the Chancery Division of the English High Court on November 25, 1957, caused Miss Kennedy to be made an infant ward of that court. On November 27, 1957, Roxburgh J. pronounced an order restraining Elwes and Miss Kennedy from intermarrying until after December 3, 1957, or further order. On December 3, 1957, the same judge pronounced a further order restraining the couple from intermarrying until after the hearing of the originating summons or until further order. The couple, however, had moved to Scotland, and Miss Kennedy's father presented a petition to the Court of Session to interdict the couple *inter alia* from marrying or purporting to go through any ceremony of marriage in Scotland, and in the meantime craving interim interdict. The petition was founded not upon the absence of parental consents but upon the fact that the orders of the High Court, being the court of the domicile of both parties, constituted a legal impediment to their intermarriage in Scotland. After hearing counsel for the parties, interim interdict was granted by Lord Migdale,[23] and the respondents presented a reclaiming motion to the Inner House. It was argued on their behalf *inter alia* (1) that the petitioner had no title to sue, because in Scotland a parent has no title to stop the marriage of a minor daughter, and (2) that the orders pronounced by the Court of Chancery were quite irrelevant in Scotland. The First Division upheld Lord Migdale's decision.[24] Dealing with the first argument Lord President Clyde observed: " But although this may be true where the parties concerned are domiciled in Scotland, I am not prepared to hold at this stage that the situation is necessarily the same where the prospective spouses are both domiciled in England as is averred in the present case. For in England it is clear from the authorities quoted to us that the rights and capacities of children under twenty-one years of age in connection with marriage are not the same as they are in Scotland. Moreover, the petitioner avers that according to the law of England a ward of Chancery cannot contract a valid marriage without the consent of the Court of Chancery. This is an averment of English law which at this stage we are bound to accept as true. The averment means, and it was contended for the petitioner that he would show, that the absence of that consent prevents her contracting a valid marriage anywhere, and the absence of consent therefore is not a mere question of formality but goes to the root of the capacity of the girl to marry. If so, the petitioner clearly has a title and an interest to interdict the marriage. This contention raises a question of considerable difficulty and complication and it appears to me impossible for us to hold that the petitioner's contention is so clearly unfounded as to justify us in rejecting it altogether at this stage. The first argument for the present reclaimers therefore based upon title in my view fails." Dealing with the argument that the Chancery orders were irrelevant, Lord Clyde remarked: " If the parties had both been domiciled in Scotland it may well be that the absence of consent by the parent would not have been an impediment to the marriage. But on the averments the parties here are both domiciled in England. The English courts have pronounced an order incapacitating the ward from marrying. The pursuer alleges that the result of that is that the ward cannot contract a valid marriage anywhere without the consent of the Court of Chancery, and at this stage I cannot exclude the possibility that that order therefore disables the ward anywhere from completing a marriage. In the end of the day it may turn out that that is not the situation, at least in Scotland. But again this is a question of considerable complication, and cannot possibly be determined at this stage in the case." The question, then, came to be whether the balance of convenience pointed to the granting of interim interdict pending the determination of these substantive issues, and the Lord President held that the danger of the spouses getting married at once and taking the law into their own hands was an unanswerable argument in favour of the granting of interim interdict. The substantive question, however, of the capacity of the parties to marry in Scotland was not decided since, before the case could be heard, the prospective spouses left Scotland and married abroad.

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[23] Interlocutor dated December 7, 1957.

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[24] Interlocutor dated December 11, 1957.

A decision on the substantive issue, however, was given in the case of *Bliersbach and Zuidinga* v. *McEwen*. Here both the prospective spouses were domiciled in Holland. It would seem that, under Dutch law, the girl, being a minor, could not contract a marriage without the consent of her father. If she did, the marriage could be annulled if proceedings were taken within six months. The father's consent having been refused, the couple travelled to Scotland where they gave notice of intention to marry under the 1878 Act. An objection was entered on behalf of the father by a Scottish solicitor, and the Registrar-General instructed the local registrar to withhold the issue of a certificate of publication of notice of marriage until a decision had been given by a competent court that the objection was invalid. The prospective spouses then raised an action in the Sheriff Court at Inverness against the objector for declarator that they were free to marry. Sheriff W. A. Donald allowed a proof of the averment of Dutch law before answer, taking the view that the question depended upon whether the marriage was void or voidable under Dutch law. The objector appealed to the sheriff,

Sheriff Hector McKechnie Q.C., who, considering for himself the relevant provisions of Dutch law without hearing expert evidence as to their tenor, found that such a marriage would be voidable and not void under Dutch law. The ground for his decision, however, was that " parental consent [was] part of the form and not of the substance of the marriage (at any rate where its absence merely renders the marriage voidable), and that the necessity for it [was] to be judged not by the law of the parties' domicile, but by that of the place of celebration." Since in the case before him the law of the place of celebration was Scotland, he held that the parties were free to marry in Scotland, and granted decree of declarator as craved. Sheriff McKechnie explained that he was not concerned with the consequences of his decision: " If it should lead to Scotland becoming a haven of refuge for foreign minors defying a parental veto, that is a matter for the legislature to deal with (if so inclined) on grounds of public policy."

Parental consents in foreign systems

A satisfactory legal analysis of these cases supposes, in the writers' submission, some understanding of the nature of the foreign impediments invoked, because these have no analogue in the law of Scotland. The approach of Scots law may be explained in the words of Baron Hume: " It does not appear that the practice of Scotland did at any time insist upon the sanction of [parental] authority for the marriage of persons even in their tenderest years. Our forefathers (it would seem) had weighed the hazard of the abuse of such a power on the part of guardians and parents and the no less considerable hazard of its leading to unlawful intercourses between young persons, against the advantages of hindering unequal matches, and had judged it better to trust the prevention of this evil to the milder and more wholesome corrections of good education and domestic authority and advice." [25] In this respect the law of Scotland differs materially from that of England and from that of many European countries.

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[25] *Lectures* (Stair Society edition), Vol. I, p. 79; *cf.* Stair, I.4.6; Craig 2.18.18; Fraser on *Husband and Wife*, *supra*, Vol. I, p. 55.

In England, parental consents have been necessary for the marriage of a person under twenty-one years of age since Lord Hardwicke's Act.[26] The present law[27] is that such a person may not marry without the consent of the persons specified in the Marriage Act, 1949, unless he or she is a widower or widow, or the court has consented to the marriage.[28] Where both parents are living and living together, the consent of both is required. A ward of court may not marry without the consent of the court, and a ward who marries, or a person who marries a ward, without such consent will be punished for contempt of court.[29] But all these requirements are directory and not mandatory. A marriage is not invalid by reason only that it was contracted without the necessary consents,[30] although a registrar is guilty of a felony who issues a certificate for marriage which has been forbidden by a person whose consent to the marriage is required[31] and a clergyman who celebrates such a marriage is apparently liable to ecclesiastical censure.[32] Mr. Elwes went through a ceremony of marriage with Miss Kennedy in New York on April 1, 1958, in defiance of the Chancery Order of December 3, 1957, referred to above. In subsequent proceedings in England Mr. Justice Roxburgh is reported to have said that he saw no reason to doubt the validity of that marriage.[32a]

The French rules relating to parental consents cannot be dismissed so summarily, not only because French legislation in this domain has been a dominant influence in the formulation of that of other European countries, but also because the description of the French law contained in English treatises on Private International Law has not always been adequate.[33] In France, apart from the period of the French Revolution, parental consents have been a prerequisite of marriage since 1556.[34] An Edict published in that year prescribed that women under twenty-five years of age and men under thirty could not marry without the consent of their parents or ascendants.[35] Above that age, the courts held that the parties could not marry without parental consents unless they had addressed at least two *sommations respectueuses* to their parents. Subsequent legislation punished both parties who celebrated marriages in defiance of the Edict[36] and the priests who officiated at them,[37] and, although during the revolutionary period there was a reaction against this paternalism, the Code Civil went back, more or less, to the old law. Women under twenty-one and men under twenty-five were not to marry without the consent of their parents.[38] Above these ages, until a woman attained twenty-five and a man thirty, *actes respectueux et formels* had to be addressed to the mother and father or, in the case of their death, to the grandparents.[39] These *actes* had to be repeated twice at monthly intervals before the parties could, after the passage of yet another month, proceed to celebrate the marriage.[40] Even after the ages of twenty-five and thirty a marriage could not be contracted unless preceded by a single *acte respectueux*.[41] These dispositions of the Code sometimes made it difficult for children to marry without the consent of their parents because of the expense of the notarial attestations required.

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[26] ss. 3 and 4.

[27] See J. Jackson, *The Formation and Annulment of Marriage* (London, 1951), pp. 178 *et seq.*

[28] Marriage Act, 1949, s. 3 and Sched. II.

[29] Halsbury's *Laws of England*, 3rd ed., Vol. 21, para. 483; Guardianship of Infants Act, 1925, s. 9 (6).

[30] *R.* v. *The Inhabitants of Birmingham* (1828) 8 B. & C. 29; *Catterall* v. *Sweetman* (1845) 1 Rob.Ecc. 304; *Chichester* v. *Mure* (1863) 3 Sw. & Tr. 223; *Re Sampson and Wall* (1883) 25 Ch.D. 482; *cf.* Marriage Act, 1949, s. 48 (1) (*b*).

[31] Marriage Act, 1949, s. 75 (3) (*c*).

[32] *Ibid.*, s. 3 (4).

[32a] *The Times*, July 30, 1958.

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[33] *Cf.* J. B. Falconbridge, *Essays on the Conflict of Laws*, 2nd ed. (Toronto, 1954), pp. 82–83, which is out of date; and G. C. Cheshire, *Private International Law*, 5th ed. (Oxford, 1957), pp. 57–58; R. H. Graveson, *The Conflict of Laws*, 3rd. ed. (London, 1955), p. 144; C. M. Schmitthoff, *The English Conflict of Laws*, 3rd ed. (London, 1954), p. 128—in all of which the analyses of *Simonin* v. *Mallac* convey a misleading impression of the point at issue.

[34] The history of this matter may be traced in the thesis of Vantroys (Abbé), *Etude historique et juridique sur le consentement des parents au mariage de leurs enfants, en droit romain, droit ancien et droit civil* (Paris, 1889), and in the standard work of A. Esmein, *Le Mariage en droit canonique*, 2nd ed. (Genestal et Dauvillier) (Paris, 1929), Vol. I, pp. 168 *et seq.*, and (Paris, 1935) Vol. II, pp. 177 *et seq.*, 186 *et seq.*; see also Zhishman, *Das Eherecht der Orientalischen Kirche* (Vienna, 1864), pp. 616 *et seq.*; Gaudemet, *Droit Romain et principes canoniques en matière de mariage au Bas Empire*, Studi Albertario (Milan, 1950), pp. 184–185.

[35] On the history of the Edict of 1556 (promulgated during the Council of Trent) and subsequent legislation, see Vantroys, *supra*, and Petot, *Cours de doctorat à la Faculté de droit de Paris*, 1950–51 (duplicated), pp. 129 *et seq.*

[36] Declaration of November 26, 1639.

[37] L'Ordonnance de Blois, 1579, Art. 40.

[38] The former Article 148.

[39] Former Art. 151.

By the latter part of the nineteenth century the law on this topic was completely out of touch with the climate of public opinion, and the legislature intervened. A law of June 26, 1896, reduced the number of *actes respectueux* to one in all cases. In 1907 the requirement of parental consent was abolished where the parties were over twenty-one, although, until the age of thirty, the parties had to notify their parents of their intention to marry.[42] This age of thirty was reduced to twenty-five in 1922,[43] and, finally, the requirement of notification was completely abolished in 1933,[44] so that today a person who is over twenty-one years of age may marry without the consent of his or her parents. Until that age the consent of the parents or grandparents is required by Article 148 of the Code Civil. With or without these consents male children may not marry until they reach the age of eighteen and female children until they reach the age of fifteen, although dispensations may be granted by the President of the Republic.[45]

Article 148 is apparently categorical in its terms: "Les mineurs ne peuvent contracter mariage sans le consentement de leur père et mère"; but it is clear that a marriage which contravenes Article 148 is not void, but merely voidable.[46] The marriage cannot be attacked by anyone, only by the relative whose consent was necessary, or by the spouse who required the consent.[47] An action to have the marriage declared null must be initiated by the minor before he or she reaches the age of twenty-two, or by the relative whose consent was necessary, within a year of the date when the marriage came to his or her notice. Moreover, the relative's right of action may be barred by his or her express or tacit consent to the marriage.[48] For these reasons the French describe the absence of parental consent as a relative nullity, and they distinguish this relative nullity from the absolute nullities which may be invoked by anyone and at any time.[49]

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[40] Former Art. 152.
[41] Former Art. 153.
[42] Law of June 20, 1907.
[43] Law of February 28, 1922.
[44] Law of February 2, 1933.
[45] Arts. 144 and 145. The requirement of parental consents in French law is discussed in English in an article by Manfred Simon, "Parental consent in French law" (1944) 56 Jur.Rev., p. 109.
[46] C.C. Arts. 182 and 183.

In Belgium, Article 148 of the Code Civil[50] provides that children who have not attained the age of twenty-one may not marry without the consent of their father and mother and that, when the latter disagree, the consent of the father suffices. Above that age they may marry without those consents if they have addressed to the parents a single *acte respectueux et formel* and allowed one month to elapse.[51] Nevertheless, until their children reach the age of twenty-five, parents who can show sufficient cause may obtain a court order staying the celebration of the marriage.[52] These solutions have been initiated by the law of Luxembourg.[53]

Dutch law,[54] which, like the law of Belgium and Luxembourg, is based on the *Code Napoléon*, prescribes that children under twenty-one must obtain the consent of their parents to their contracting marriage. But an action of nullity on this ground must be raised within six months; that is to say, lack of parental consent renders the marriage voidable and not void.[55] After majority, until the age of thirty, the child must request his parents for their consent[56]; but if they do not consent, he can apply to a magistrate, who hears the parties. A persistence by parents in their opposition to the marriage of their major children means only that the marriage has to be deferred for three months.[57]

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[47] C.C. Art. 182.

[48] C.C. Art. 183.

[49] The absolute nullities may result from disregard of the essential conditions of marriage, where, in particular, there is identity of sex, impuberty, bigamy, and absence of consent through defect of the mind. But it may also flow from a disregard of the formalities of celebration where, for example, the marriage is clandestine, or it has not been celebrated before a registrar, or where that registrar was not legally competent. There are two cases of relative nullity: first, where the marriage is vitiated by fraud, error, or force and fear, and, secondly, where the parents of a minor child have not given their consents.

[50] Law of April 30, 1896, Art. 1.

[51] Code Civil, Art. 151, modified by the Law of April 30, 1896, Art. 4.

[52] Code Civil, Art. 152, modified by the Law of April 30, 1896, Art. 4.

[53] Law of June 12, 1898.

[54] Netherlands Civil Code, Art. 92; French translation in *Textes Legislatifs Etrangers*, 1953, No. 1, published by the Belgian Ministry of Foreign Affairs.

In Italy, the law prescribes that a minor may not contract marriage without the consent of the person who exercises parental or curatorial power.[58] Where this consent is refused, the marriage may nevertheless be authorised "for grave reasons" by a judicial authority.[59] Majority is at twenty-one,[60] and, after that age, no consents are necessary for marriage. It would seem that the absence of consent, as in France, is a "relative nullity" only.[61]

German law provides that the age of marriage is sixteen for women and twenty-one for men, although dispensations are envisaged.[62] The age of majority is twenty-one and the consent of the minor's legal guardian is required before he or she may contract a marriage.[63] German law does not hold that a marriage contracted without parental consents is necessarily void *ab initio*, but it may be declared null *ex nunc* in an action at the instance of parents.

All the legal systems discussed so far require the consent of parents to the marriage of minors. While the new codes of several countries under Soviet influence do not as a rule require such consents,[64] they are required by the majority of Europeanised legal systems.[65]

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[55] Netherlands Civil Code, Art. 146; *cf.* the discussion of the *Bliersbach-Zuidinga* case, above.

[56] Netherlands Civil Code, Art. 99.

[57] *Ibid.*, Arts. 100–104.

[58] Codice Civile, Art. 90.

[59] *Idem.*

[60] *Ibid.*, Art. 2.

[61] *Ibid.*, Art. 121.

[62] Control Council Law No. 16 on Marriage, Art. 1 (1).

[63] *Ibid.*, Art. 3.

[64] See the Roumanian Family Code established by the Law No. 4 of December 21, 1953, and the Bulgarian Law on Persons and Family modified by the Ukases No. 56/1951 and No. 43/1953; *secus* Hungarian Law No. 4 of 1952, Art. 10. (French texts of these laws are published by the Belgian *Service de Legislation Etrangère.*)

[65] See note 65 on page 268.

The statutory law of Scotland

In considering the relevance in Scotland of foreign impediments to marriage, the statutory law of Scotland is of little assistance. Two statutes, however, refer to impediments to marriage, and both have been founded upon in the cases concerning runaway marriages. The first is the Marriage Notice (Scotland) Act, 1878, which envisages the publication of notices of intention to marry. This permits persons interested to lodge, if they so wish, objections to the marriage. The Act provides that "where the objection is that the persons intending to contract marriage are within the forbidden degrees of consanguinity or affinity, or are both or either of them already married, or are both or either of them not of marriageable age, *or are from any other legal incapacity disqualified to give such consent as is necessary for marriage*[66] . . . the Registrar shall suspend the issuing of his certificate until there shall be produced to him a certified copy of a judgment of a competent court of law to the effect that the parties are not in respect of the said objection disqualified from contracting such marriage."[67] This section was invoked by the objecting parents in the *Goldsmith-Patino* case and *Bliersbach-Zuidinga* case, which are discussed above. They founded particularly upon the words italicised and argued that since their children were domiciled in countries where parental consents were a condition of their right to marry, their children were legally incapable of giving the consents necessary for marriage. But while the section indicates a procedure which may be invoked by persons seeking to prevent a marriage where there is a legal incapacity disqualifying the parties to give the necessary consent to it, it is really

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[65] See the useful collection of texts in German (to our knowledge there is no up-to-date equivalent in English or French) of Bergman, *Internationales Ehe-und Kindschaftsrecht* (Frankfurt, 1952), 2 Vols. (looseleaf); for European countries there are brief notes in Boschan, *Europäisches Familienrecht*, 2nd ed. (Berlin and Frankfurt, 1954); for Commonwealth countries, see the *Abstract of Legal Preliminaries to Marriage in the United Kingdom, Commonwealth and Irish Republic*, published by the Stationery Office, 1951.

[66] Authors' italics.

[67] s. 10 (3) (*b*).

colourless as to what constitutes a legal incapacity which disqualifies the parties from giving consent. In particular, the Act does not indicate whether the legal incapacity may be one which derives from the personal law of the spouses.

Another statutory provision which has been founded upon is the Marriage (Scotland) Act, 1939, which requires parties contracting marriage before a registrar to declare in the presence of two witnesses of the age of sixteen or upwards that they know of no legal impediment to their marriage.[68] The Act, however, does not enumerate the legal impediments to marriage and is as colourless as the 1878 Act on the question whether these impediments may include an incapacity unknown to the law of Scotland, but subsisting under the law of the parties' domicile.

The problem in private international law

The substantive question raised by all the Scottish cases to date is virtually the same, whether an incapacity to marry affecting a person under his or her domiciliary law should be recognised in Scotland as disabling him or her from marrying in Scotland. It will be conceded, however, that if the incapacity is regarded by the domiciliary law itself as being purely territorial in its operation, there will be no case for taking notice of it in Scotland. Now, while this is a question of English law as to which the writers hesitate to make any positive affirmation, it seems probable that the English legislation requiring consents to the marriage of infants is in the eyes of English law purely territorial in its operation. This construction was certainly placed upon Lord Hardwicke's Act, and it seems not unlikely that the English courts would place the same construction upon section 3 of the Marriage Act, 1949.[69] If this is a correct interpretation of English law, there would be no case for interdicting the marriage in Scotland of English minors simply for the reason that their parents have not consented to the marriage. Moreover, there is little reason to suppose that, in the eyes of English law, an infant who lacks the necessary consents is subject to an incapacity to marry. A marriage celebrated without these consents, or even in defiance of a court order prohibiting the marriage, is not consequently invalid. Dicta in English cases, to the effect that foreign requirements of parental consents are to be classified as matters of form only, may simply be an extrapolation of the domestic classification.[70] If so, no notice should be taken in Scotland of the English requirement of consents, since only the formal requirements of Scots law are material when a marriage is celebrated in Scotland.[71]

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[68] s. 1 (1) (ii).

[69] It may be observed, however, that the English courts have decided that both the Royal Marriages Act, 1772, and the Age of Marriage Act, 1929, are personal and not territorial in their operation; *Sussex Peerage Case* (1844) 11 Cl. & Fin. 85 and *Pugh* v. *Pugh* [1951] P. 482.

Not all foreign disabilities, however, present such a relatively simple problem. The French Civil Code provides that its rules relating to status and capacity are in principle personal in their application and follow Frenchmen wherever they may be. Article 3, al. 3, provides: "Les lois concernant l'état et la capacité des personnes régissent les Français, même résidant en pays étranger." This general principle is reinforced in the case of marriage by Article 170 of the Code Civil, which provides: "Le mariage contracté en pays étranger entre Français et entre Français et étranger sera valable, s'il a été célébré dans les formes usités dans le pays, pourvu qu'il ait été précedé de la publication prescrite par l'article 63, au titre *Des Actes de l'état civil*, et que le Français n'ait point contrevenu aux dispositions contenues au chapitre précédent." In systems

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[70] J. H. C. Morris, writing in Dicey's *Conflict of Laws*, 7th ed., p. 235, remarks: "From the analytical point of view there may be good reason for characterising the requirements of English law as to parental consent as matters of form, because their wording and application show that the consent is considered as an element in the ceremony."

[71] It is understood that in one case the marriage in Scotland of an English female infant ward of court to an American was effectively prevented by the issue against him and immediate implementation of a deportation order. If this is so, the order seems to have assumed the illegality of the American's proposed action in Scotland, a matter which is not free from doubt and which, one would have thought, should have been left to the Scottish courts to decide.

like the French, where the rule as to parental consents is clearly personal in its application, there is a prima facie case for considering its relevance in Scotland. If the foreign legal rule is prima facie relevant as being personal in its operation, its application is thought to depend upon general principles of private international law. These the private international lawyer regards as being well settled: the formal validity of a marriage is a matter for the *lex loci celebrationis*,[72] while its essential validity is a matter for the law of the domicile of the spouses.[73] It is true that Lord Fraser denies the latter proposition and says that "in the British dominions and America" it is enough that the person be capable according to the law of the place of celebration.[74] With respect, however, this is no longer the law either of England or of Scotland.

It was in *Brook* v. *Brook*,[75] where the effect of the incapacity of affinity was considered, that English law for the first time clearly distinguished between questions of formal validity and questions of essential validity. Prior to that decision, as we have seen, the English courts had affirmed the validity of marriages celebrated in Scotland in evasion of Lord Hardwicke's Act. It would scarcely have been practicable to declare all such marriages to be null and it was thought sufficient to say that, since they had been celebrated in Scotland, their validity was a matter for Scots law. But in *Brook* v. *Brook* the marriage was of a kind which offended the moral and religious views of the judges who decided the case and they found it convenient to distinguish the earlier cases by saying that they stood because they were concerned with formal and not with essential requirements. Lord Campbell explained: "While the forms of entering into the contract of marriage are to be regulated by the *lex loci contractus*, the law of the country in which it is celebrated, the essentials of the contract depend upon the *lex domicilii*, the law of the country in which the parties are domiciled at the time of the marriage and in which the matrimonial residence is contemplated. Although the forms of celebrating the foreign marriage may be different from those required by the law of the domicile, the marriage may be good everywhere. But if the contract of marriage is such, in essentials, as to be contrary to the law of the country of domicile, and it is declared to be void by that law, it is regarded as void in the country of domicile, though not contrary to the law of the country in which it was celebrated." [76] Both the propositions that the formal validity of the marriage is a question for the *lex loci celebrationis* and that the essential validity of the marriage is a question for the law of the domicile find illustration in the Scottish cases,[77] and they may be regarded as perfectly well settled.

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[72] *Berthiaume* v. *Dastous* [1930] A.C. 79, *per* Lord Dunedin at p. 83; *Starkowski* v. *Attorney-General* [1954] A.C. 155 *per* Lord Reid at p. 170; and the Scottish cases cited in Walton on *Husband and Wife*, 3rd ed., p. 332.

[73] *Mette* v. *Mette* (1859) 1 Sw. & Tr. 416; *Re Paine* [1940] Ch. 46; and the Scottish cases cited in footnote 77 below.

[74] *Op. cit.*, Vol. II, p. 1299; but on p. 1303 his approach is different: "Any personal incapacities imposed by the law of domicile will not be enforced against the validity of a marriage unless, firstly, the legislature has clearly enacted (as the Code Civil does) that these shall follow the persons subject to the law, to a foreign country; or, secondly, unless the marriage be an incestuous or polygamous one."

[75] (1861) 9 H.L.Cas. 193.

The question, then, comes to be whether the absence of parental consent is a matter of formal validity or a matter of essential validity. It is obvious that different systems may give a different answer to this question, so that the further problem is raised whether the classification is one to be performed by the *lex fori* or by the *lex causae* or by a combination of the two. This is one of the central theoretical problems in private international law, and one which has divided academic writers in all countries. Unfortunately, too, it has never been discussed from the point of view of Scots law. In an article directed specifically to the question of parental consents to marry it is impracticable to plunge into the detail of this debate.[78] This is not necessary, however, to justify the following simple propositions:

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[76] p. 207.

[77] On formal validity, see the cases cited in Walton on *Husband and Wife*, 3rd ed., pp. 332 *et seq.*; *Miller* v. *Deakin*, 1912, 1 S.L.T. 253; on essential validity see *De Thoren* v. *Wall* (1874) 1 R. 1036; (1876) 3 R. (H.L.) 28; *Webster* v. *Webster's Tr.* (1886) 14 R. 90; *Lendrum* v. *Chakravarti*, 1929 S.L.T. 96; *MacDougall* v. *Chitnavis*, 1937 S.C. 390, 1937 S.L.T. 421; *Martin* v. *Buret*, 1938 S.L.T. 479, also dicta of Lord President Cooper in *Prawdziclazarska* v. *Prawdziclazarski*, 1954 S.C. 98, 100; 1954 S.L.T. 41, 43.

(1) The requirement of parental consents to marriage is something unknown to the internal law of Scotland. It is not possible, then, for the Scottish judge to find any guidance at all in his own law as to how such a requirement should be classified. To discover whether it is a rule of formal or of essential validity he must necessarily look to the foreign law in question.

(2) While it is true that the *Actes respectueux* required by the former law of France and the present law of Belgium and Luxembourg would be found upon the adduction of evidence of the law of these countries to be a matter of formal validity,[79] the requirement of parental *consents* under the French and, it is confidently believed, related systems would be found to be a matter of essential validity. It is so because, without these consents, the minor's psychological will to enter into the contract of marriage is considered to have no legal effect. Dicey recognised this, saying bluntly that "A person who cannot marry without the consent of another is, *pro tanto*, under an incapacity."[80] Westlake took the same view: "A consent which it is impossible to do without in the domicile ranks, for the purposes of private international law, among the conditions of capacity, and not among the forms of marriage."[81] It seems difficult to deny this

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[78] An excellent discussion of this matter is contained in Falconbridge, *supra*, pp. 73–90; see also A. H. Robertson, *Characterization in the Conflict of Laws* (Cambridge Massachusetts, 1940), pp. 239–245; R. H. Graveson, *Jo.Comp.Leg.*, Vol. 20, Pt. I, p. 62 (1938); E. Rabel, *The Conflict of Laws* (Michigan, 1945), Vol. 1, pp. 266–268; and E. J. Sykes, 2 *I. & C.L.Q.* (1953), pp. 78 *et seq.*

[79] See *infra.*

[80] *The Conflict of Laws*, 2nd ed., p. 616.

[81] *Private International Law*, 5th ed. (London, 1912), s. 25; *cf.* M. Wolff, *Private International Law*, 2nd ed. (Oxford, 1950), p. 329.

> without entering into involved arguments which ultimately cannot be sustained.[82]

That there is one English case which decides that parental consents are a matter of formal validity only is beside the point. The question is one of fact—the interpretation of a rule of a foreign system—and, even if the English case were otherwise binding as a precedent in Scotland (which it is not), it would lack even persuasive value upon the question at issue. Only a passing reference to this case would be required, but for the fact that Sheriff McKechnie purported to follow this decision in the *Bliersbach-Zuidinga* case.

The question first arose in *Simonin* v. *Mallac*,[83] a case which was decided before *Brook* v. *Brook*. Valerie Simonin, a French subject domiciled in France, then aged twenty-two, married Leon Mallac, also a French subject, domiciled in France, then aged twenty-nine, in London during the course of a short visit, and the couple afterwards returned to France. The purpose of the ceremony in England was to evade the requirements of the *sommations respectueuses* required by Article 151 of the French Civil Code. In an action at the instance of the woman the French courts held that the marriage was null and void for a number of reasons, in particular because it was celebrated without the parties having obtained or sought the consent of their parents, and because the marriage was in deliberate evasion of French law. The woman subsequently moved to England and petitioned the English court for a decree of nullity. This was refused on the ground that the validity of the marriage was a matter for the *lex loci celebrationis* alone. It will be observed that this extremely wide proposition was qualified very soon afterwards by the House of Lords in *Brook* v. *Brook*, and that *Simonin* v. *Mallac* could only stand alongside the later case on the assumption that the question at issue in *Simonin* v. *Mallac* could properly be classified as one of form. This was the construction, indeed, which was placed upon *Simonin* v. *Mallac* in subsequent English cases.[84]

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[82] See, however, Falconbridge, *supra*, pp. 74 *et seq.*

[83] (1860) 2 Sw. & Tr. 67; see also *E.* v. *E.* (1893) 37 S.J. 250, cited by Jackson, *supra*, at p. 183.

This assumption could well be made, since *Simonin* v. *Mallac* was not a case where the objection to the marriage in French law was the absence of parental consents, since both of the spouses were over twenty-one. Although in the presence of such consents the problem would not have arisen, the objection to the marriage was in fact the omission of the *actes respectueux et formels* formerly prescribed by Article 151 and the following articles of the Code Civil. As already suggested, this requirement could justifiably be classified as being one of form in French law.[85] Without attaching too much importance to the express use of the term "*formels*" in the Code, it may be observed that the accomplishment of the *actes respectueux* at the due times would eventually permit of a valid marriage without parental consents. The practical effect of the procedure, as one of the draftsmen of the Code observed, was "to require a deferential act capable of leading to a reconciliation between ascendant and descendant."[86] No doubt they also served to reinforce the publicity afforded by the publication of banns then, and still, required in France by Article 170 of the Code Civil. This may explain why the ground of the nullity of the Simonin-Mallac marriage in France was not by itself the omission of the *actes respectueux*, but the clandestinity of the marriage of which this omission was one of the elements.

The false idea, however, that *Simonin* v. *Mallac* decided that the consent of parents was a question of form was adopted *obiter* by Cotton L.J. in *Sottomayor* v. *De*

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[84] *e.g.*, *Sottomayor* v. *De Barros* (*No. 1*) (1877) 3 P.D. 1.

[85] This is the view taken by Westlake, *supra*, ss. 23–25; Cheshire, *supra*, p. 58; Robertson, *supra*, p. 241. On the other hand, Rabel, *supra*, p. 266, describes *actes respectueux* as "one of the requirements called, according to French doctrine" *formes habilitantes*, understood in France to have nothing to do with formalities. See also Falconbridge, *supra*, p. 79.

[86] Bigot de Préameneu, *Exposé des motifs du Titre "Au mariage,"* Locré t. IV, pp. 585 *et seq.*

Barros[87] where he said: "This consent must be considered a part of the ceremony of marriage, and not a matter affecting the personal capacity of the parties to contract marriage." Thereafter, the same view was adopted by the Court of Appeal in *Ogden* v. *Ogden*,[88] which *was* a case which turned upon the absence of parental consents. A domiciled Frenchman, nineteen years of age, married a domiciled Englishwoman in England without first obtaining the consent of his only surviving parent as required by Article 148 of the Code Civil. The marriage, by reason of this absence of consent, was declared null by the French courts. The lady subsequently married again in England, describing herself as a widow. Her second husband later petitioned the English court for a decree of nullity on the ground of her bigamy. In granting decree, Sir Gorell Barnes said that the issue was whether or not a marriage indisputably valid if celebrated by two English people "ought to be held invalid on the ground that the foreigner was by the statute law of his country subject to the necessity of complying with certain formalities in order to be at liberty to enter into the marriage." The decision has been interpreted to mean that every rule requiring parental consents to marry must be classified as relating to the formalities or ceremony of marriage and referable to the *lex loci celebrationis*. But the case has been unfavourably commented upon both by the Privy Council in *Attorney-General for Alberta* v. *Cook*[89] and by the House of Lords in *Von Lorang* v. *Administrator of Austrian Property*.[90] In *Chapelle* v. *Chapelle*[91] Willmer J. remarked: "The actual decision of this case [*sc. Ogden*] was clearly at variance with the decision in *Salvesen or Von Lorang* v. *Administrator of Austrian Property*, and must be taken to be overruled by the House of Lords in the latter case." The failure of the court in *Ogden* to give effect to the domiciliary decree of nullity deprives the decision of its authority and, it is submitted, the case is of no persuasive value in Scotland.

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[87] *Supra*, footnote 84.

[88] [1908] P. 46.

[89] [1926] A.C. 444, 455.

[90] 1927 S.C. (H.L.) 80, at pp. 92 and 95; 1927 S.L.T. 438.

[91] [1950] P. 134, 143.

This digression to consider the English authorities has merely led back to the proposition that Scots law should have regard to the way in which French law classifies Article 148 of the Code Civil and to the way in which other systems classify analogous provisions in their codes. French law, it is believed, regards the question as being one of essential validity or capacity, referable in principle to the law of the domicile. It is, however, a separate question whether the Scottish courts will so far take notice of this incapacity under a foreign law as to forbid the celebration of marriage by the incapable persons in Scotland.

It has been suggested in the Scottish cases that a distinction falls to be drawn between those cases where the foreign system holds that a marriage contracted in defiance of its prescriptions is null and void and those in which the marriage is merely voidable, the inference being that it is only in the former case that notice must be taken of the foreign incapacity.[92] It is submitted, however, that the effect which is ultimately given to the marriage abroad is only indirectly relevant to the question at issue. The real question is whether the foreigner has the capacity to contract marriage in Scotland, and the ultimate effect, or absence of effect, given to the marriage abroad is relevant only to the possible argument that runaway marriages in defiance of the wishes of parents are contrary to public policy, for to permit the celebration of a marriage in Scotland which has at best an uncertain future in the country of the domicile is to show a considerable disregard for the concept of marriage as an indissoluble union between the spouses. It seems unlikely, however, after the remarks in *Pugh* v. *Pugh*,[93] where the circumstances were not dissimilar, that the Scottish courts would attempt to ride the horse of public policy in this connection.

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[92] This was apparently the view taken by Sheriff Donald in the *Bliersbach-Zuidinga* case; it is adopted by Schmitthoff, *supra*, p. 318, but is criticised by Dicey, 5th ed., pp. 966–967, note (i).

[93] [1951] P. 482.

We are left, once again, with the central and thorny problem of what effect the Scottish courts will give to an impediment to marriage under the spouses's personal laws where the question is not whether or not a marriage already concluded is valid, but whether one about to be concluded is permissible. Wolff suggests that the English courts would be unlikely to take notice of such an impediment.[94] While there is no conclusive authority on this question in Scots law,[95] the principle has for long been clear that the capacity of parties to enter into a marriage is a matter for their personal law. It is submitted that, if they have no capacity under that law, they cannot clothe themselves with that capacity by crossing the border into Scotland.

Legislation upon foreign impediments to marriage

Whether the writers are correct or incorrect in thinking that the marriage of a person subject to an impediment under his or her personal law may be interdicted in Scotland, they suggest that there is a case for legislation which, while leaving unaltered the existing rights of minors domiciled in Scotland, would make it more difficult for minors from other countries to marry in Scotland when such a marriage is contrary to the fundamentals of their personal law. They are fortified in this belief by the expressed views of various organs of opinion in Scotland, and especially that of the General Assembly of the Church of Scotland.

On the Continent this problem is dealt with in different ways. A foreigner who contracts a marriage in Germany is required to produce a certificate emanating from the internal authorities of the country of nationality to the effect that there is no impediment to the marriage.[96] From this requirement exemption may be granted by the president of the regional court.[97] Italian law envisages a certificate of the same kind.[98] In Sweden, a Royal Ordinance requires the interested party to produce a "certificate issued by an official of his country."[99] Hungarian law calls for proof that the stranger is subject to no impediment under his personal law, but does not indicate from whom this proof must emanate. Like German law, the law of Hungary contemplates dispensations, which are issued by the Minister of Justice.[1] In Swiss law there is required, according to distinctions which cannot be developed here, either a certificate of the foreign State attesting that "it will recognise the marriage with all its effects" or a "certificate of capacity to marry." The cantonal authorities can in either case issue dispensations.[2]

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[94] *Supra*, p. 331.

[95] The article "Runaway Marriages" cited above is favourable to this view. Walton on *Husband and Wife*, 3rd ed., p. 324, is unfavourable.

[96] Marriage Law of February 10, 1946, art. 10 (Control Council Laws, Nos. 16 and 52); see *Manual of German Law* (H.M.S.O., 1950), Vol. 1, pp. 155–156, and *Le*

French practice in this matter is of great interest. The current procedure is outlined in instructions issued by the Minister of Justice which are followed by the registrars but are not binding upon the courts.[3] The broad outlines of the procedure are as follows:

(1) If the personal law of the future spouse permits of the marriage in circumstances where French law would not, the registrar (*officier de l'état civil*) must demand either

(a) a certificate of capacity to marry "which attests that the party has the capacity under his national law to

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droit international privé de la famille en France et Allemagne, French edition published by the Societé de Législation Comparée, 1954, pp. 22–23, and German edition by the *Gesellschaft für Rechtsvergleichung*, 1955, p. 29.

[97] *Ibid.*; and Art. 7 of the application section of the Marriage Law.

[98] Art. 116 of the Codice Civile of 1942. It is a debated question whether the Italian registrars are bound by this certificate. On this topic, see Monaco, *L'Efficacia della legge nello spazio* (1952), No. 64, p. 123.

[99] Royal Ordinance of December 31, 1931; French translation in Makarov, *Recueil de textes concernant le droit international privé*, Vol. I, 5 (Sweden).

[1] Art. 6 (1) of the Law IV/1952 concerning marriage. French translation in Makarov, *supra*, 5 (Hungary).

[2] Art. 168 of the Ordinance of June 1, 1953, on civil status. Text in Makarov, *supra*, 5 (Switzerland).

[3] General instruction of the Minister of Justice of September 21, 1955, relating to registration matters, p. 9322; reproduced in the *Revue Critique de droit international privé*, 1955, pp. 574 *et seq.* The instructions occasionally lead to curious results; for a discussion of these see the *Travaux du Comité français de droit international privé*, 16th–18th years (rapporteur H. Batiffol) (Paris, 1957).

contract a valid marriage with the person whom he proposes to marry " ; or

(b) a *certificat de coutume* which merely reproduces the appropriate disposition of the foreign marriage law in question ; in this case " . . . it falls to . . . the registrar to infer from the certificate produced the capacity of the future spouses, assuming that their nationality is not in question." Certificates of this kind need not necessarily emanate from the internal or consular authorities of the foreign State, but from lawyers of the country in question or even from French lawyers, whose qualifications for the issue of such certificates it belongs to the registrar himself to judge.

(2) If the personal law of the foreigner does not permit of the marriage in circumstances where French law would, the registrar must nevertheless proceed to celebrate the marriage after satisfying himself that the requirements of the internal law of France have been respected. But he is bound to warn the interested parties that they run the risk of seeing their marriage subsequently declared null, and that *even in France*. He must in addition prepare a minute noting that the parties were unable or unwilling to produce any certificate and that he warned them that the marriage was celebrated at their *risques et périls*. Thus a Dutchman who has attained twenty-one years of age may marry in France without the consent of his parents, although Dutch law requires this consent up to the age of thirty. Does this mean that there is scope in France for runaway marriages? Doubtless, but it must be remembered that the foreigner who is residing only temporarily in France,[4] and in particular the " foreigner who has come to France solely to contract marriage and without the intention to establish a residence there," cannot marry without special authorisation.[5] This is delivered by the competent officer (the *préfet*) only after an inquiry.[6]

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[4] More exactly the foreigner who has merely a temporary residence permit.

[5] General Instruction of Minister of Justice, *supra*, No. 482.

[6] *Ibid.*, No. 483.

In the United Kingdom the Marriage with Foreigners Act, 1906, envisaged the production of certificates of no impediment in the case of marriages in Scotland.[7] For this purpose, however, the Act has proved to be a dead letter, since its operation depended upon the making of Orders in Council and none have been made. Moreover, it applies only to the marriages of foreigners with British subjects and does not cater either for the situation where two foreigners desire to marry in this country, or where, for example, persons domiciled in England desire to marry in Scotland. The Act, therefore, would require considerable amendment before it could provide a satisfactory solution to the problem of runaway marriages. It would seem to be better to repeal the 1906 Act and to start afresh with new legislation catering for the situation where Scots law is not the personal law of both parties to a marriage in Scotland.

The Secretary of State for Scotland has suggested,[8] in answer to representations of the Church and Nation Committee of the General Assembly, that there are objections in principle to such legislation. These may be taken seriatim:

(1) "It would involve making a distinction in the marriage law of Scotland between persons with Scottish domicile and those domiciled elsewhere." The foregoing discussion, it is hoped, indicates that precisely such a distinction *should* be made.

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[7] S. 2 (1) provides:

"Where arrangements have been made to the satisfaction of His Majesty with any foreign country for the issue by the proper officers of that country, in the case of persons subject to the marriage law of that country proposing to marry British subjects in the United Kingdom, of certificates that, after proper notices have been given, no impediment according to the law of that country has been shown to exist to the marriage, His Majesty may, by Order in Council, make regulations—

(*a*) requiring any person, subject to the marriage law of that foreign country, who is to be married to a British subject in the United Kingdom, to give notice of the fact that he is subject to the marriage law of that country to the person by or in the presence of whom the marriage is to be solemnised; and

(*b*) forbidding any person to whom such a notice is given to solemnise the marriage or to allow it to be solemnised until such a certificate as aforesaid is produced to him."

[8] Scottish Home Department letter, ref. 9724/278E of April 9, 1958.

(2) "The accepted legal principle at present is that the formalities of marriage are governed by the law of the country in which the marriage takes place." While this is true, it has been shown that parental consents under foreign laws are not necessarily part of the formalities of marriage.

(3) "If lack of consent in the case of persons domiciled furth of Scotland were to be taken into account under Scottish marriage law, it could be maintained that other requirements in the marriage law of the country (or countries) of domicile should also have to be fulfilled before such a marriage could be validly celebrated in Scotland; and the Secretary of State thinks that this would be most undesirable." The writers agree that it would follow that notice should be taken in Scotland of other essential requirements of the personal laws of the respective spouses. Far from being undesirable, this is eminently desirable to "preclude the scandal which arises when a man and woman are held to be man and wife in one country and strangers in another."[9] It is true that there may be foreign impediments (for example, impediments upon racial or religious grounds) which it would be undesirable to enforce in Scotland. This problem could be met by a limitative enumeration of these impediments.

In addition to these alleged objections on principle the Secretary of State has pointed to certain practical objections:

> "To be satisfactory, such arrangements must prevent the celebration of the marriage, and not simply lead to the annulment of the marriage after celebration.
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> "It would thus be necessary first to establish that a person presenting himself or herself for marriage was a minor, and was domiciled abroad. If the law merely required such a person to make a declaration which would disclose these facts, it could be circumvented by a false statement; and ministers and registrars could

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[9] *Wilson* v. *Wilson*, L.R. 2 P. & D. 435, at p. 442.

> scarcely be expected to investigate the truth of such declarations.
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> "It would next be necessary for the minister or registrar to decide whether there was any impediment to the marriage under the law of the country (or countries) of domicile. For this purpose he would have to be familiar with the marriage law of a large number of foreign countries; he would have to decide which of these codes to apply if the two parties were ordinarily resident in different foreign countries; and, if he decided that parental consent to the marriage of one of the parties was required, he would have to satisfy himself about the validity of any purported statement of consent which was produced to him by that party. It appears to the Secretary of State that these are obligations which it would be unreasonable to place on every minister and registrar who may properly carry out marriages."

With great respect, the writers do not think that these objections are either substantial or insurmountable. The argument that a mere declaration could be circumvented by a false statement applies also to the existing impediments to marriage in Scots law, including that of a subsisting prior marriage. It should at least be possible to prevent runaway marriages when the existence of impediments is brought to the notice of the registrar or minister.

In the writers' view legislation *can* be devised which largely meets these practical objections. They suggest that legislation should explicitly forbid the solemnisation of marriage between persons either of whom under his or her own personal law is incapable of contracting marriage for reasons of nonage, of consanguinity or affinity, or of lack of third party consents. Whether or not failure to comply with this rule should nullify the marriage should be declared expressly to be a matter for the foreign personal law. These rules should be enforced by providing that a person subject to a foreign personal law must give notice of that fact when application is made in Scotland for publication of banns or publication of notice of intention to marry. The Act should forbid the issue by a session clerk or by a registrar, to either of whom such notice has been given, of certificates of publication of banns or of notice until there shall be produced to him a certificate issued by the competent authorities of the applicant's State to the effect that no impediment to the marriage exists by the law of that State (which hereinafter will be called a certificate of matrimonial capacity) or an affidavit by the applicant that he or she is subject to no incapacity under his or her personal law, or a decree of the Scottish court authorising the marriage.[10] It is not thought desirable to require the production of a *certificat de coutume*. To assess the authority of such a certificate and to interpret it would often be a task beyond the competence of country registrars. On the other hand, a certificate of matrimonial capacity is usually couched in clear and unambiguous terms and will normally bear intrinsic evidence of its authenticity. Such a certificate is the ideal, but to require it in every case would be impracticable because several systems do not provide for the issue of such certificates.[11] When such is the case, a simple affidavit that no such impediment exists should take the place of the certificate of matrimonial capacity.

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[10] This is necessary since certain foreign impediments (such as the prohibition of marriage on grounds of race or religion) could not be recognised by the Scottish courts.

[11] In France the issue of such a certificate is now provided for by Art. 10 of a Decree of August 19, 1946: "When a Frenchman contracts marriage abroad according to the forms in use in the territory, the diplomatic or consular agents will deliver to him a certificate of capacity to marry attesting that the applicant fulfills the conditions laid down in Chapter I of Title V of the Civil Code." See the treatise of Makarov, *supra*, for references to the law in Hungary (Decree-law, No. 23/1952, art. 16, III), Sweden (Law of July 8, 1904, Ch. I, s. 3, and Law of November 12, 1915, art. 2–1), Switzerland (Ordinance on civil status of June 1, 1953, art. 171). In the United States there is similar legislation in Connecticut (General Statutes, § 7303), and Massachusetts (General Laws, Ch. 207, s. 12). In the United Kingdom, the Marriage with Foreigners Act, 1906, envisaged the issue of "a certificate that after proper notices have been given no legal impediment to the marriage has been shown to exist." Although the Act may be thought to depend for its operation on the making of Orders in Council (none of which have been made), in Scotland the Registrar-General gives effect to the Act by publishing notice of the intended marriage abroad in the appropriate registration district. Where no objection is lodged, the registrar issues a certificate of

Legislation on these lines would have the advantage of being in consonance with the provisions of the Hague Convention of June 19, 1902, upon conflicts of law in matrimonial questions, which at present is in force as between twelve countries.[12] Article 4 of the Convention provides that persons marrying abroad shall show that they are subject to no impediments under the personal (national) law either by "a certificate of the diplomatic or consular officers authorised by the State of which the contracting parties are nationals, or by any other mode of proof. . . ." The solution which is here proposed is recognised not to be entirely free from objection, but it would be a considerable improvement upon existing practice and would virtually solve the problem of runaway marriages.

A. E. ANTON.
PH. FRANCESCAKIS.

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publication, amplifying the heading to read "Pursuant to the Marriage Notice (Scotland) Act, 1878, as amended, and the Marriage with Foreigners Act, 1906." This is then produced to the appropriate consular officer, who then issues a certificate that no impediment to the marriage is known to exist, for production to the foreign marriage authority. It is understood that practice is similar in England.

[12] Germany, Austria, Hungary, Spain, Italy, Luxemburg, Holland, Poland, Portugal, Roumania, Sweden and Switzerland: see the table published in the *Revue Critique de droit international privé* (1954), p. 893.

Note.—This article was in press before the recent decision of the First Division of the Court of Session affirming the judgment of Sheriff McKechnie in *Bliersbach and Zuidinga* v. *McEwen*, and takes no account of the opinions of the Division in that case.

CASES AND COMMENT

1. SCOTTISH CASES

MARRIAGE—non-age—subsequent cohabitation with habit and repute.

A recent case of great interest was *Woodward* v. *Woodward*, 1957 S.C. 415, 1958 S.L.T. 213, where parties married in 1942, the wife being then under sixteen but falsely stating her age as sixteen. The parties thereafter cohabited and five children were born and registered as legitimate. In 1951 the wife brought a declarator of nullity on the ground of her own incapacity by reason of non-age. In 1954 the husband brought a declarator of marriage on the ground of marriage having been constituted by cohabitation with habit and repute, subsequent to the wife's having attained sixteen. After proof, decree of declarator was granted in both actions. This thus interestingly shows how a marriage defective by reason of non-age can be cured, and illustrates the value of the retention of the old form of irregular marriage by cohabitation. Points of jurisdiction in each action were also material: in the declarator of nullity it was held that the Scottish court might exercise jurisdiction even though the husband had been a domiciled Englishman, since Scotland was the *locus contractus* and since the husband had not insisted in objection to the jurisdiction of the Scottish courts and indeed invoked it in the action at his own instance; in the declarator of marriage it was held that the Court of Session was competent because Scotland was the *locus contractus* and the wife had assented to the exercise of the jurisdiction. The opinion of Lord Guthrie contains a valuable review of the decisions on jurisdiction in nullity and declarators of marriage, and for that reason, apart from the interest of the somewhat unusual facts, the decision is notable.

D. M. W.

DAMAGES—penalty—loss of use of vehicle.

Two Sheriff Court decisions deal with interesting points of damages. In *Reid* v. *Campbell*, 1958 S.L.T. (Sh.Ct.) 45, C. had bought a one room and kitchen dwelling-house from R. for £295, payable £20 as deposit and £5 per month thereafter, with interest. There was a provision that, if any instalment should still be unpaid when the next instalment fell due, the purchaser should forfeit all right to the dwelling-house. The purchaser fell into arrears and the seller sued to enforce the forfeiture; it was argued that the forfeiture provision was in the nature of a penalty and unenforceable. It was held, on the analogy of hire-purchase cases and provisions for conventional irritancies, that the provision was valid and enforceable.

In *Galbraith's Stores, Ltd.* v. *Glasgow Corporation*, 1958 S.L.T. (Sh.Ct.) 47 a motor-lorry had been damaged in a collision with a 'bus. The 'bus owners admitted liability and paid the cost of repairs of the lorry, but disputed liability for an element of damages for loss of use. The claim covered depreciation on the damaged lorry for the period it was out of use, the appropriate share of the overhead expenses of the pursuer's whole fleet of vehicles and of the licence and insurance charges. It was emphasised in judgment that the fact that the pursuers maintained other vehicles which enabled them, without hiring a substitute vehicle, to carry out the duties of the damaged vehicle did not deprive them of a right to damages for the loss of use of that vehicle. The learned sheriff pointed out that the claim for licence and insurance charges might well not be established but that it was a relevant head of claim and, as the defenders then consented to decree passing, the question must await determination in a future case.

D. M. W.

NEGLIGENCE —relevancy— child receiving shock in house under demolition.

Miller v. *South of Scotland Electricity Board*, 1958 S.L.T. 229, is a case which promises to be interesting when finally decided. At the present stage the House of Lords has reversed the unanimous decisions of the Lord Ordinary and the First Division (who had dismissed the action as irrelevant) and allowed a proof before answer. The facts were that a local authority removed tenants from a row of houses with a view to the demolition of the houses, and requested the Board to cut off the electricity supply. A boy of eleven entered the partially demolished house and was injured by touching a live electric cable. The boy's father sued the Board but not the local authority who were occupiers of the premises under demolition. In the Court of Session the action was dismissed as irrelevant: the House of

Lords reversed. It is regrettable to note that Lord Denning approached the case from an entirely English standpoint and devoted so much space to discussion of the now obsolete English procedure by demurrer, and that three of the speeches of the noble and learned Lords are singularly unhelpful. The only assistance which can be gained from the case is from the speech of Lord Keith and the latter part of Lord Denning's address, from which it would appear that their Lordships regarded this as a doubtful case but that the pursuer did not so obviously have no case as to justify immediate dismissal of the action. It is to be hoped that when the proof has been taken a fuller discussion of the law will be possible in the light of the facts found by the court, because the speeches of their Lordships at this stage are too general to permit the inference of any useful propositions of law.

D. M. W.

DEPOSIT—edict nautae, caupones, stabularii.

The continuing importance of the edict *nautae, caupones, stabularii* in Scotland is evidenced by the decision in *Burns* v. *Royal Hotel* (*St. Andrews*), *Ltd.*, 1958 S.L.T. 309. There a guest at an hotel had the misfortune to have his car, which was garaged in a lock-up in the hotel premises, completely destroyed by fire which originated in the boiler-room of the hotel and spread to the lock-up. He claimed damages on the basis of the edict; the hotel pled that the fire was a *damnum fatale*. The precise cause of the fire was not established and accordingly, since the hotel had failed to prove that the fire was truly *damnum fatale* and not attributable in any way to negligence on the part of hotel servants, it must be held liable for the loss of the car. It is rather hard to see how, apart from lightning, a fire could be *damnum fatale*, and the natural inference, in the absence of other explanation, is that it was caused by negligence of some kind attributable to the hotel proprietors. The protection conferred on the traveller by the edict is still valuable.

D. M. W.

Beddie v. *British Transport Commission*, 1958 S.L.T. (Sh.Ct.) 42, has the added authority of an unreported decision of the Second Division of 1927 being quoted in it, and makes the quite important point that the duty of lookout incumbent on an engine-driver and that incumbent on a motor-driver are different. The engine-driver has no duty but to look out for signals and does not have to look out for persons or animals on the line, whereas the motor-driver has to watch for persons on the road, as well as for animals, other vehicles and signals. It seems possible that the engine-driver's duty has here been stated too categorically: is it not rather a duty to look out for signals and for such obstructions as, having regard to weather and the rest of his own engine, he can reasonably see? If he did see an animal or a child on the line, surely he could not go ahead without braking and rely on the plea, "I had no duty to try to pull up." The importance of the distinction between the two sets of facts is, however, usefully stressed in this case.

RAILWAY—duty of engine-driver.

D. M. W.

2. ENGLISH CASES

In these days of "do it yourself" repairs the decision of the Court of Appeal in *Wells* v. *Cooper* [1958] 3 W.L.R. 128 may be regarded as of some practical importance. A fishmonger, when delivering some fish at the defendant's house, was invited inside for a cup of tea. When leaving, the house door handle came off in his hand causing him to fall off an unrailed platform as a result of which he sustained injuries. The defendant who was an amateur carpenter of some experience had fixed the handle some months previously with short screws which were not long enough to withstand the force of the pull which the plaintiff fishmonger found it necessary to exert. The plaintiff claimed damages on the grounds (1) that the defendant was in breach of his duty as invitor; and (2) that irrespective of that relationship the defendant, in carrying out the work of fixing the handle himself, assumed a duty towards the plaintiff as a lawful visitor to the house to take reasonable care to protect him against any danger created by the insecurity of the handle. The Court of Appeal held that on either ground of action the duty owed by

DO IT YOURSELF REPAIRS—Duty of householder.

the defendant to the plaintiff was a duty to take reasonable care for his safety and that in a trifling repair of this nature the defendant did nothing wrong in undertaking the repair himself. On the other hand it was stated that the degree of care and skill required of him must be measured not by reference to the degree of competence in such matters which he personally happened to possess, but by reference to the degree of care and skill which a reasonably competent carpenter might be expected to apply to the work in question. Otherwise the extent of the protection that an invitee could claim in relation to work done by the invitor would vary according to the capacity of the invitor. Since, however, the defendant was doing his best to make the handle secure, he must be taken to have discharged his duty of care, because his belief that short screws would be adequate was not one which no reasonably competent carpenter would not have entertained.

W. A. E.

RES IPSA LOQUITUR

Walsh v. *Holst & Co., Ltd. and others* [1958] 1 W.L.R. 800 is under appeal to the House of Lords but it meanwhile deserves a note. A man walking along the pavement of a narrow street was hit on the head by a brick which came from a building on the opposite side of the street where work was in progress for the conversion of premises into offices. He brought an action for personal injuries against the main building contractors, the subcontractors, and the owners and occupiers of the building, an electricity Board. It was held, in the first place, that the doctrine of *res ipsa loquitur* applied to shift the onus of proof from the plaintiff, for a brick falling on the head of a person lawfully on the highway spoke effectively against all the defendants once it was shown that the Board was in occupation of the premises from which it fell while the contractors and subcontractors employed by it were carrying out work involving the dislodgment of bricks, and no collateral negligence was relied upon. In the circumstances it was held that the defendants had discharged the onus on them by showing that they had taken all reasonable steps in the performance of the work to prevent injury to users of the highway, and were accordingly not liable. In a strong dissenting opinion Morris L.J. held that although the standards of reasonableness must be adhered to, it was no answer, if an accident occurred which could have been avoided by using care, to say that certain safety precautions were taken which nearly succeeded. The defendants must either show that they were not negligent or must give an explanation of the cause of the accident which did not connote negligence. The evidence here did not negative the existence of negligence. It will be interesting to hear what the House of Lords has to say.

W. A. E.

CONTRACT TO PUBLISH ARTICLE—Specific performance.

Joseph v. *National Magazine Co., Ltd.* [1958] 3 W.L.R. 366 raised the question whether an author is entitled to enforce publication of an article. An expert on jade entered into a contract with *The Connoisseur* magazine whereby an article on jade was to be written by him and appear under his name in the magazine. The exact details, however, were not agreed upon. On receipt of the plaintiff's article the editor of the magazine sent it for revision to a journalist who changed the title and conclusion and made considerable stylistic alterations and certain alterations of fact. The plaintiff refused to allow the article as revised to appear under his name and was unwilling to agree with the defendants' intention to print it with or without his name. He then sued for specific performance and damages. The court held that the plaintiff was amply justified in refusing to allow publication under his name of the article as revised and that the contract had therefore not been repudiated; but the court refused specific performance because the exact terms of the article were never agreed between the parties. The plaintiff was awarded £200 as damages owing to the opportunity he had lost of enhancing his reputation as an expert on jade.

W. A. E.

NEGLIGENCE—Failure to provide goggles—Whether workman would have worn.

Nolan v. *Dental Manufacturing Co., Ltd.* [1958] 1 W.L.R. 936 is a rare example of where the common law duty can still be more stringent than the statutory duty. A workman lost his eye when a chip flew off a grinding wheel while he was sharpening a tool. Goggles were not provided for use by toolsetters on the grinders; nor were there adequate notices as to their availability. The plaintiff never wore goggles while using the grinders and saw no reason to do so;

he would not have used goggles without strict orders and supervision. It was held, following *Wardlaw* v. *Bonnington Castings* [1956] A.C. 613, 1956 S.C.(H.L.) 26, S.L.T. 135, that although the defendants were in breach of section 49 of the Factories Act, 1937, and the Protection of Eyes Regulations, 1938, by their failure to provide goggles, the plaintiff had not shown that the probability was he would have worn them, and consequently had not shown that the defendants' breach caused the accident. At common law, however, the employers were in breach of their duty to ensure not only that goggles were provided, but also through means of adequate supervision that they were used. The trial judge did not consider that the plaintiff was the type of man who, in spite of strict orders and supervision, would have tried to dodge them on every occasion.

W. A. E.

3. PRIVY COUNCIL CASES

" ACCESSORY BEFORE THE FACT ": Alleged principals acquitted: Inconsistency.

Surujpaul, called *Dick* v. *The Queen* ([1958] 1 W.L.R. 1050) was an appeal from a judgment of the Court of Criminal Appeal of British Guiana which had dismissed the appellant's appeal against his conviction at the Criminal Assizes for the county of Berlice, British Guiana, on a charge of being an accessory before the fact to the murder by shooting of a police constable. The appellant was charged with four other men (Nos. 2, 3, 4 & 5) in one count with the murder of the police constable, and at the end of the case for the prosecution the jury, on the direction of the trial judge, acquitted accused No. 2. Owing to the uncertainty which, if any, of the remaining accused was actually present and taking part in the murder, and which, if any, might have been accessories before the fact, the jury were, quite properly, asked with regard to each accused whether they found him Guilty or Not Guilty of being accessory before the fact to murder, and whether they found him Guilty or Not Guilty as principal. They found the appellant Guilty as an accessory before the fact to murder and Not Guilty as principal, and Nos. 3, 4 and 5 Not Guilty as accessories and Not Guilty as principals.

The case for the Crown was that the accused men had engaged in a plot to rob the overseer of an estate of the wages of the estate workers; that the overseer was being driven in a Land-Rover with the police constable as escort; that two of the accused, wearing masks and armed with a stick and a double-barrelled shotgun, held them up; that a shot from the rear of the vehicle was fired, wounding the police constable (who died later in the day); and that five masked men were seen running away. The prosecution's case rested largely on the evidence of a man whom the jury were rightly told to treat as an accomplice. If it was believed, there could be little doubt of the existence of the plot, and there was material in all the circumstances from which the jury might have drawn the inference that the plan was carried out by all or some of the accused and that in the course thereof the murder was committed. But the jury, whatever they might have thought with regard to the evidence of the plot, apparently did not consider it sufficient to warrant the conviction of the accused as a principal. The jury, however, found the appellant guilty as an accessory before the fact to murder, and his co-accused (other than the one who had been discharged) Not Guilty either as accessories or as principals.

The appellant contended that these verdicts were contradictory and inconsistent—that there could be no accessory without a principal. The Crown contended that, as against the appellant, the jury might have found something in his statement to the police which would amount, with the accomplice's evidence, to sufficient evidence and admissible against him that the crime was committed by one or more of those who had been " counselled or procured " by the appellant so to do.

The Board stated that it was essential to the conviction of any one of the accused as an accessory before the fact for the Crown to prove that he had counselled, procured or commanded one or more of the other accused persons to murder the police constable, and that such person or persons had in fact murdered him. By their verdict the jury had found that murder by any one of the accused had not been proved, but that nonetheless the appellant was guilty of having counselled one or more of them to commit murder, and that one or more of them, unspecified, in fact committed it. That certainly appeared, at first sight at any rate, an inconsistent and contradictory verdict.

An examination of the appellant's statement to the police was necessary. But although such statement might afford very strong corroboration of the accomplice's evidence with regard to the part which the appellant took in the plot, and as to his counselling or inciting the others to commit robbery or murder, it was difficult to see how it could afford any evidence as to the actual commission of the crime at which by their verdict the jury had found he was not proved to have been present and assisting. A voluntary statement made by an accused person was admissible as a "confession." He could confess to his own acts, knowledge or intentions, but he could not "confess" as to the acts of other persons which he had not seen and of which he could only have knowledge by hearsay. A failure by the prosecution to prove an essential element in the offence could not be cured by an "admission" of that nature. The passage in the statement of the appellant on which the Crown relied was as follows: "When [No. 2 accused] came back Sunday morning 10-3-'57 about 5 o'clock he and [No. 5] began to gaff; and [No. 5] asked [No. 2] why he shoot the man and [No. 2] say when I stick it up the man put he hand pon the revolver foh draw am out, and then [No. 2] and [No. 4] shoot am." A statement of that nature could not, in the opinion of the Board, be regarded as equivalent to evidence by witnesses of the acts spoken to in this conversation and as sufficient to warrant as against the appellant a finding that No. 2 and/or No. 4, both of whom the jury acquitted, in fact committed the murder.

The Board found it difficult to believe that in any event the jury applied that process of reasoning in arriving at their verdict. They considered it much more likely that the jury failed to appreciate the distinction between incitement to murder or conspiracy and being an accessory before the fact. The Board were satisfied on an examination of the evidence that there was no distinction with regard to the evidence relating to the commission of the substantive offence as between the appellant and the other accused which could justify the result arrived at. The appeal was accordingly allowed, the verdict and the sentence quashed and a verdict of Not Guilty entered.

MAORI LAND: Compulsory purchase: Compensation.

Maori Trustee v. *Ministry of Works* ([1958] 3 W.L.R. 536) was an appeal from the Court of Appeal of New Zealand on a case stated by the Maori Land Court relating to the basis of compensation to be awarded in respect of land taken compulsorily by the Crown under the Public Works Act, 1928. In 1948 a plan was prepared for the subdivision of certain Maori land of some 242 acres. The plan required the approval of the Ministry of Works. By an order of July, 1948 (which did not become operative until approved by the Minister for Maori Affairs), the land became vested in a body, referred to as the Maori Land Board, as trustee. In September, 1951, the Minister of Works gave notice of intention to take about 91 acres of the 242 acres, and in November of that year the Minister of Maori Affairs notified his approval of the order vesting the 242 acres in the Maori Land Board. The 91 acres became vested in the Minister of Works as from September 15, 1952 (the specified date). On September 29, 1952, the Maori Land Board claimed compensation for the taking of the land, and in September of that year the Maori Trustee (the present appellant) came in place of the Maori Land Board. In April, 1954, the application of the Ministry of Works for the ascertainment of compensation for the land taken came before the Maori Land Court which stated a case for the opinion of the Supreme Court. By consent the case stated was removed into the Court of Appeal.

At the date of the taking no more than a paper plan of a proposed subdivision had been made. If the approval of that plan had been received from the appropriate Minister and the subdivision had been in fact carried out by the provision of the necessary roads, drainage and other facilities, some of those lots could have been sold immediately for residential purposes and the balance sold in lots from time to time over a period of years subsequent to the taking. By section 29 (1) (*b*) of the Finance Act, 1944, which governed the assessment of compensation, " The value of land shall, subject as hereinafter provided, be taken to be the amount which the land if sold in the open market by a willing seller on the specified date might be expected to realise." The case stated, after pointing out that it would have been useless for the Maori Land Board to have proceeded with the subdivision after the issue of notice to take the land, continued: " No evidence was adduced to show when the subdivision would have been proceeded with if the Minister's approval had been granted at an earlier date. The evidence adduced did show that the carrying out of a subdivision would have involved a considerable outlay for roading, drainage and other development, and other costs of subdivision. Upon the hearing of evidence and submissions of counsel the court has found that part of the land would have been immediately saleable at the date of the taking in lots upon a subdivision either for residential or industrial purposes, and that the balance would have been saleable in lots upon a subdivision for residential or industrial purposes from time to time over a period of years subsequent to the date of taking. A question of law arises as to the basis upon which the value of the land should be assessed, including the question whether there should be any difference in the method of assessment of the value of, first, that part of the land which would have been immediately saleable in lots at the date of the taking, and, secondly, that part which would have been saleable in lots from time to time over a period subsequent to the date of taking." The questions stated for the opinion of the court were: "(1) Is the value of the land to be assessed upon the assumption that the claimant sold the land at the date of the taking in one undivided parcel to one purchaser desirous of acquiring it for the purpose of subdivision and sale in lots? (2) Is the value of the land to be assessed upon the assumption that the claimant sold at the date of the taking that part of the land which was then immediately saleable in lots to several purchasers in lots according to a subdivision made by him and sold the balance of the land to several purchasers in lots from time to time over a period subsequent to the date of the taking according to a subdivision made by him?"

The Court of Appeal did not answer the questions specifically, but expressed their opinion in the following order: "(1) In accordance with section 29 (1) (*b*) of the Finance Act (No. 3), 1944, and subject to the other provisions of that section, the function of the Maori Land Court is to ascertain as the value of the land 'the amount which the land if sold in the open market by a willing seller on the specified date might be expected to realise.' The specified date is September 15, 1952. (2) The valuation must be of the land in the state in which it is on the specified date; any potentialities shall be taken into account in assessing its value. (3) The court must contemplate the sale of the land as a whole unless on the specified date there could have been separate sales of particular portions, and there was a market for such separate portions. Only if the land had been legally subdivided at that date so that particular lots might have been sold and title given can it be said that there could have been sales of particular portions. (4) If the land has to be valued as a whole, the court in assessing the potentialities may take into account the suitability of the land for subdivision, the prospective yield from a subdivision, and the likelihood that a purchaser acquiring the land with that object would allow some margin for unforeseen costs, contingencies and profits for himself."

The Board stated that it was fundamental that the land must be valued in its state at the time of the taking. By the Act of 1944 that value was to be assessed at the amount which a willing seller might be expected to realise if the land were sold in the open market at the date of the taking. That was not necessarily the price which it would fetch, because the costs of realisation would have to be taken into account. What in effect was being contemplated was the capital value of an asset, and while in the case of land that might not be easily calculable the problem did not usually present any great difficulty in the hands of competent land valuers. With regard to the land here in question there were three material questions for the compensation tribunal to have in view. First, the Maori Minister had to give his consent to any sale. Secondly, the plan could not be carried into execution without the consent of the Minister of Lands or delegated authority. Thirdly, there were in fact no subdivided lots as shown on the plan, no roads, fences, accesses, drainage or other facilities. The land was still land which had to be developed for subsequent occupation as building land. It might be easy for the compensation tribunal to assume that the Maori Minister would have given his consent, since the scheme was for the benefit of Maoris. The question whether, but for the notice to take and the subsequent taking by proclamation, the Minister would have approved the proposed scheme involved problems for the compensation tribunal on which the Board could only speculate and were unable to enter. The compensation court would have to consider the likelihood of the Minister's approving the scheme, or some alternative scheme. That all led to the third consideration, that no subdivisions existed at the date of taking. The task of the compensation court would be to estimate how far the land was ripe at the date of taking for subdivisional development and how soon, looking to the need of any necessary consents, the land would in fact, but for the taking, have been fully developed, and to value it accordingly. The land must be valued for what it in fact was on the specified date—a tract of land capable as to some, perhaps all, of it, of subdivision into building allotments, and of being sold at some time and over some period in that form. That circumstance would influence a purchaser in his determination of price. In estimating what price a purchaser would be willing to pay recourse might be had to an examination of the estimated gross yield from a subdivision as yet notional only, and the estimated deductions which a purchaser would have to take into account; but that was the extent to which a notional subdivision could be regarded. There must be excluded from the court's contemplation retention by the claimant and an assessment of what in his hands it would yield if subdivided, because that course was not open to him. There were no subdivisions, and to give a claimant compensation on the basis that there were would be to give him compensation for unrealised possibilities as if they were realised possibilities.

Counsel for the appellant were faced with the difficulty that, on their submission, the land, on the assumption of its being retained for sales in subdivision by the owner, should be assessed at a higher value than if it were sold to a hypothetical purchaser for similar development. In the Board's view it was impossible that the land should have two values, on the hypothesis required by the statute that it was sold in the open market by a willing seller. The land in the hands of the owner was just capital for whatever purpose he chose to put it. And if he chose to employ his capital in a subdivisional scheme the profit which he would make could not in anticipation be taken to increase the value of the land before that profit had been realised. If the owner be regarded as a hypothetical purchaser of the land to be valued wishing to buy it for subdivision he would not be expected to pay more for it than any other purchaser buying for the same purpose. The Board were unable to agree with the appellant's submissions, but considered that the third head of the opinion expressed by the Court of Appeal should be varied. That opinion seemed to proceed on the view which the majority of the court took that *St. John's College Trust Board* v. *Auckland Education Board* ([1945] N.Z.L.R. 507) was correctly decided on its special circumstances. In the view of the Board that case was wrongly decided. The third head of the opinion should be: "The court must contemplate the sale of the land as a whole unless it appears that the necessary legal consents to a subdivisional plan had been given and a survey on the ground at the specified date would have disclosed that the land or some part of it was in fact so far subdivided that the subdivided parts could at that date have been immediately sold and title given to individual purchasers, in which case the parts so subdivided might be separately valued for the purpose of arriving at the total amount of compensation." The appeal was accordingly dismissed, but the order of the Court of Appeal was varied as stated.

PERJURY: Summary statutory powers.

Don Thomas Samaratunga v. *The Queen* ([1958] 3 W.L.R. 4) was an appeal from an order of a Commissioner of Assize for the Supreme Court of Ceylon sentencing the appellant to three months' rigorous imprisonment for having given false evidence during the course of a criminal trial. The order was made under the powers conferred by section 440 (1) of the Criminal Procedure Code (Legislative Enactments of Ceylon, 1938, c. 16). That section enacted: "(1) If any person giving evidence on any subject in open court in any judicial proceeding under this Code gives, in the opinion of the court before which the judicial proceeding is held, false evidence within the meaning of section 188 of the Penal Code it shall be lawful for the court, if such court be the Supreme Court, summarily to sentence such witness as for a contempt of court to imprisonment either simple or rigorous for any period not exceeding three months."

Before the commissioner the appellant had been indicted with Y. S., the latter with attempting to murder one P. S., and the appellant with aiding and abetting. In the non-summary proceedings before the magistrate, one G. had given evidence that he was employed by the appellant and that the appellant had given him and Y. S. arrack and a club and had directed them to go and kill P. S. At the trial G., while continuing to say that he was in the appellant's employment, said that the rest of his evidence as summarised above was fabricated. He stated that he had given his earlier evidence at the request of P. S.'s wife, and that he had been promised P. S.'s daughter K. in marriage if he gave that false evidence. He produced two documents which, he said, had been given him by P. S.'s wife containing the false evidence. The case against the appellant had been based on G's evidence as given in the magistrates' court. There was no other evidence against him, and the commissioner therefore directed the jury to acquit the appellant. That was done, and the case proceeded against Y. S., who ultimately pleaded Guilty.

The commissioner directed the clerk of assize to prepare an indictment against G. under section 439 of the Criminal Appeal Code, which provides: "(1) If in the course of a trial by jury before the Supreme Court any witness shall in any material point contradict either expressly or by necessary implication the evidence previously given by him at the inquiry before the magistrate, it shall be lawful for the presiding judge, upon the conclusion of such trial, to have such witness arraigned and tried on an indictment for intentionally giving false evidence in a stage of a judicial proceeding. In a trial before the Supreme Court the indictment shall be prepared and signed by the registrar, and the accused may be tried by the same jury. . . . (2) At such trial it shall be sufficient to prove that the accused made the contradictory statements alleged in the indictment, and it shall not be necessary to prove which of such statements is false." G. pleaded Guilty. The commissioner wanted to hear evidence with regard to what he called "the background" with a view to deciding the appropriate sentence. If the statement made to the magistrate was fabricated G. had sworn false evidence incriminating an innocent man, to further a love affair. If that evidence were true, his evidence at the trial might have been due to a desire to shield the appellant, whom everyone had described as his master, as a result of or in hope of some payment. The commissioner might have left G. to call or give evidence in mitigation if he so desired. His counsel made various statements on instructions to the effect that his evidence just given at the trial was the truth. The commissioner himself decided to have witnesses called, and ordered that P. S., P. N., his wife, K., his daughter, and the appellant should be called. The wife and daughter both denied that they had written the documents which G. had produced, or that there was any truth in his story of his possible marriage with the daughter. The daughter said that the appellant employed G. The appellant then gave evidence. In the course of his examination by counsel for the crown the commissioner asked him a number of questions. The commissioner came to the conclusion that the appellant was deliberately lying, in particular in saying that G. had never been his servant, that he did not know him, though he had once seen him in the bazaar, and that he did not know his name until he had given evidence against him. It was in respect of that evidence that the sentence appealed from was imposed.

Their Lordships stated that in *Chang Hang Kiu* v. *Piggott* ([1909] A.C. 312) the Judicial Committee considered an Ordinance of Hongkong in similar terms to section 440 (1) of the Ceylon Criminal Procedure Code. It was laid down that before an order was made under such a provision the gist of the accusation must be made clear to the witness and he must be allowed an opportunity of giving reasons against the taking of summary measures. The only basis for the submission on behalf of the appellant in the present case that neither of the above conditions had been satisfied was that the nature of the charge which had already been indicated in general terms was particularised with regard to one specific point after the appellant had clearly been given an opportunity to give reasons against summary measures being taken. In their opinion that point failed. With regard to the submission that the commissioner had not exercised his discretion judicially, he saw and heard the witnesses and regarded the matter as clear beyond doubt. There was clearly material on which he could be so satisfied.

From its nature the power was one which should only be used when the judge is " clear beyond doubt "—to use the words of Lord Oaksey in *Subramaniam* v. *The Queen* ([1956] 1 W.L.R. 456, at p. 460)—that the witness had given false evidence as defined. Subject to that overriding principle, their Lordships adopted what Wood Renton C.J. said in *Banda* v. *Sada* ((1914) 17 N.L.R. 501, at p. 512) as to the true interpretation of section 440 of the Code: " The Legislature has left the courts quite free as a matter of law to deal under that section with any form of 'false evidence' within the meaning of section 188 of the Penal Code, and if we attempt to fetter that discretion by rigid general rules as to the class of cases in which it may or may not be exercised, we shall be acting rather in a legislative than in a judicial capacity, and running the risk of paralysing the operation of a statutory power, the maintenance of which in full working order is essential to the administration of justice in this country. But there is ancient and sound authority for the proposition that 'all things that are lawful are not expedient,' and we have every right to consider ourselves, in the exercise of our original jurisdiction, and in the exercise of our appellate jurisdiction [entitled] to inquire whether this statutory power can be safely exercised in any particular case that has come before us." Their Lordships, having held that the commissioner was entitled to act, and had rightly acted, under the summary power conferred by section 440 (1) of the Code, dismissed the appeal.

4. REPORT OF THE COMMITTEE ON DILIGENCE

The law-maker in the field of diligence has at least three fundamental problems of policy: (1) To secure that the decisions of the courts can be made effective against the property, or in a now happily limited class of cases against the person, of the debtor, (2) To have regard to the human needs of the debtor and his dependants and to ensure that diligence, while effective, may not be oppressive, and (3) To determine the appropriate degree of preference that should be accorded to competing creditors. To preserve a just balance among these considerations is a hard task and no Committee, however wise, could devise a system of diligence that would satisfy the lawyer, the sociologist and the different classes of creditors. When to the problems of policy are added those of practicability—the necessity of suggesting workable and reasonably economic methods of enforcing decrees—the area of controversy is widened still further, for even those who agree upon policy may not be at one upon administrative proposals.

In these circumstances the members of the Committee appointed, under the chairmanship of Sheriff Hector McKechnie, to review the law and practice of diligence in Scotland will have no illusions that their Report (published in June 1958) will command universal approval. That, however, should not detract from the merits of the Committee's achievement. No reader of the Report can fail to appreciate the comprehensive and thorough investigation that underlies it nor can any fair-minded reviewer refrain from commending the good sense and, in at least one matter, courageous innovation which characterise its proposals. The Committee have made a difficult assignment the opportunity for a valuable contribution towards the solution of the problems of diligence in Scotland and deserve the warmest congratulations on the results of their work.

The concern of the Committee to safeguard the proper interests of the debtor is manifest throughout their consideration of the amendments required in the law of arrestments. The principal alterations proposed are (1) limitation of arrestments on the dependence of an action to the amount of the claim plus not more than 20 per cent. to cover expenses, (2) abolition of the right to arrest wages on the dependence of an action, (3) limitation of arrestments of wages in execution to one half of the amount by which the wages exceed £4 per week except in the case of alimentary debts when the whole surplus above £4 per week would be arrestable and (4) abolition of the right of local authorities to arrest the whole of a man's earnings in respect of unpaid rates. All of these are meliorations of the rigour of the existing law, and all of them in the writer's view are amply justified. The purpose of arrestments on the dependence is to provide security for the sum sued for and the expenses involved, not to embarrass the debtor in the conduct of his business by attaching unnecessarily large amounts; it is wrong that a creditor should be able to affect a man's relationship with his employer by an arrestment of wages on the dependence before he establishes his right to recover the debt claimed; 35s. per week, the present non-arrestable amount of wages, has long been inadequate for subsistence; and the Committee's view that "the debtor's need for sufficient means to maintain himself and his dependants is a more pressing consideration than that of a local authority's lack of power to choose its debtors" is an entirely adequate reason for recommending the removal of the now anachronistic privilege of arresting the whole of a debtor's wages for arrears of rates. The plea of inability to choose debtors has been a good horse which has carried the local authorities far in their quest for privileges in the field of diligence and it is time that limits were set to its career, although it is fair to record that the writer has heard of no case in practice where local authorities have used their extensive rights otherwise than with consideration and restraint.

Under the heading of alterations of various procedures the Committee make a number of suggestions designed to reduce expense, to afford protection to the debtor and to improve procedure.

The most significant proposal as regards economy is to permit arrestments and charges to be served postally as an alternative to the present mode of service by officers. It is contemplated that postal service will be regarded as the normal method and the expense of employing an officer will only be recoverable upon special cause shown. It is also proposed that only one witness to a poinding be required. All these proposals have been worked out with care and would effect reduction in expense without impairing the effectiveness of the diligence.

Further protection for the debtor is given by the recommendations as to an explanatory note accompanying a charge so that the debtor may appreciate its significance (and there is no doubt that to many laymen a charge in its present form is not a readily intelligible document), and the recommendations that a charge should in all cases precede repossession under the Hire Purchase and Small Debt (Scotland) Act, 1932, or summary ejection. Especially welcome is the suggestion that an explanatory note should also accompany an arrestment to make clear to the arrestee its effect and his duties and obligations under it: the number of telephone inquiries which come to solicitors from perplexed employers in whose hands wages have been arrested is ample evidence of the desirability of the recommendation.

It is observed with satisfaction that the Committee rejected a suggestion for the introduction of procedure whereby the court might examine a person against whom a decree for payment had been granted with regard to his means. The reason for rejection was the cost of the procedure but it is also objectionable in principle: once a debtor is bankrupt it is right that his whole affairs be judicially investigated in the interests of creditors who suffer loss by his failure, but until that point is reached the intrusion of the court into the debtor's private affairs is premature.

In conveyancing matters the Committee recommend radical simplification of the procedure in relation to adjudications and maills and duties, the general effect of their proposals being to make these remedies steps in diligence, through a shortened procedure carried out by the creditor and his solicitor, instead of substantive actions as at present, although in the case of adjudications the authority of the court is still required in the form of a special warrant included in a decree for money. Actions of adjudication and maills and duties are seldom defended, and the new procedures proposed have the merits of speed and economy. It is also recommended that warrants for inhibition may be granted by the sheriff instead of, as hitherto, by the Court of Session only.

One of the most valuable sections of the Report is the comprehensive survey of the present system of officers of court. The Committee come down decisively against the introduction of salaried officers of court and favour the continuance of the present system in which messengers-at-arms and sheriff officers are not State servants. The existing system, however, undoubtedly suffers from lack of co-ordination, no doubt due to the fact that, like Topsy, it has "just growed." To supply that defect the Committee recommend the appointment by the Lord President of a standing advisory committee called the Officers of the Court Committee whose functions would include the review of scales of fees and the training and recruitment of officers. This is unquestionably a wise proposal: apart altogether from its primary functions such a Committee will be most helpful in other respects, *e.g.*, in providing experienced advice on the diligence aspects of new legislation.

The most intractable problem referred to the Committee was that of making diligence effective in remote areas. Its solution, however, is urgently necessary. As evidence tendered to the Committee showed, debtors in certain areas are aware that by reason of expense no diligence will be done against them, and it is essential for the reputation of law in Scotland that civil obligations should not be a matter of geography. The Committee consider that the alternative method of serving charges and arrestments by post and the requirement of only one witness to a poinding should materially reduce the difficulties of doing diligence in remote areas, and obviously this should be so. The principal recommendation, however, is that a Diligence Fund, financed either by the National Exchequer or by way of a small additional surcharge on court fees, should be created, and used substantially in defraying the extra travelling costs incurred in doing diligence in remote areas. The new Officers of Court Committee should, it is suggested, have the duty of advising the Lord President regarding the operation of the Fund. The failure of previous expedients has plainly driven the Committee to the conclusion that the problem of expense in doing diligence in distant places can only be solved effectively by financing the extra travelling costs from a central fund. But, having reached the conclusion that such a scheme is justified by the necessity of securing that the writ of the courts shall run effectively in every part of the land, the Committee seem strangely hesitant to carry the principle to its logical conclusion, as appears from their tentative suggestions (a) that a creditor should, in the case of diligence done in a remote area, bear the cost of doing diligence within thirty miles plus £3 and 20 per cent. of the balance of additional expenses and (b) that a contribution from the Fund should not be payable in respect of a journey to execute diligence on a single decree. Surely if a creditor pays the expense of doing diligence within thirty miles, he pays enough : the whole balance should be recoverable from the Fund which is being created for the purpose. And if a creditor wishes to have diligence done at a distance on a single decree, why should it be a condition of recovering the extra expense from the Fund that he waits until the officer has some other commission to execute in the vicinity ? Speed is of the essence in diligence, and the officer's next occasion for travelling to the area may well be to perform a competing act of diligence against the same debtor. The creation of a Diligence Fund should provide the solution to a long-standing difficulty ; your reviewer can only hope that it is speedily adopted and that its effectiveness will not be impaired by an endeavour to effect comparatively minor economies.

The final section of the Report dealing with diligence in respect of alimentary debts contains its most important single innovation in the proposal for the appointment of collecting officers to receive payments of money due under decrees of aliment. The Royal Commission on Marriage and Divorce had previously expressed the view that it was desirable that such payments be made to an officer of court on lines similar to the procedure which has operated satisfactorily in magistrates' courts in England. The Committee, after examination and investigation of the English system, have recommended that the work of collecting money payable to individuals under all kinds of decrees for aliment should be done in the offices of sheriff clerks in Scotland on the pattern of the English procedure, with the important reservation that in Scotland the collecting officers should not undertake formal enforcement action or diligence when payments fall into arrear. Few solicitors who have experience of the defects of the present procedure doubt the necessity for reform. For the reasons adduced in evidence to the Committee the existing methods of collection, either by the holder of the decree direct or through her solicitor, are, in cases of default in payment, often only tardily effective and are unsatisfactory to those who are urgently in need of the payments and troublesome and unremunerative to the solicitor concerned. If all such payments within a Sheriff Court district are made to a court officer the efficiency of collection should be materially improved since the volume of work will justify the institution of a proper routine procedure for collection and prompt follow-up action in cases of non-payment. Apart altogether from considerations of its effectiveness, however, the proposal is welcome in that it will give to women who hold such decrees (who as the Committee point out are probably the weakest section of the whole community) an assurance that the court is concerned to assist them in the special practical difficulties involved in the enforcement of an alimentary decree by the provision of an officer charged with that duty to whom they can turn for help. The capacity to absorb from other legal systems procedures which are demonstrably of value has always been characteristic of Scots law : this is a clear case for its exercise.

It remains only to commend the clarity with which the Report sets out the researches and the conclusions of the Committee, and the excellent arrangement of the various topics, no easy matter in so wide-ranging a review. It is to be hoped that an early opportunity will be found to implement the recommendations of the Committee: this Report is too valuable to be neglected.

J. M. H.

CURRENT PERIODICAL LITERATURE

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BIGAMY AND THE ONUS OF PROOF IN CRIMINAL LAW

As a general rule honest and reasonable mistake of fact, negativing dole or *mens rea*, is a good defence to a criminal charge. Thus a person cannot be convicted of bigamy if he or she had reasonable grounds for believing that the spouse was dead at the time of the second ceremony of marriage.[1] It would seem to follow, though authority is lacking, that reasonable belief that the marriage was void, or had been dissolved by divorce, would likewise be a defence. In England there are cases which are notoriously difficult, if not impossible, to reconcile. On the one hand, *R.* v. *Tolson* [2] decided that honest and reasonable belief in the death of a spouse is a good defence. On the other hand, it was held in *R.* v. *Wheat* [3] that a bona fide and reasonable belief on the part of an accused that he has been divorced is not an answer to a charge of bigamy. Contrary to Scottish practice, however, bigamy is charged in England as a statutory offence, and, since *R.* v. *Wheat* proceeded on a construction of the statute in question, it is not a helpful decision on this side of the Border. It would appear that *R.* v. *Wheat* is unpopular outside England, at any rate in Australia, where it has been criticised in the High Court and is rejected in Victoria, although the Victorian statute dealing with bigamy is practically identical in its terms with the English Act. In the *Modern Law Review* for September, 1958, Mr. D. J. MacDougall comments on a case which recently divided the Supreme Court of Victoria. The trial judge there left it to the jury to decide whether the accused had an honest belief, on reasonable grounds, that he was free to marry a second time on the ground that his first marriage had been dissolved by a decree of divorce. He also directed them, and it was on this point that the case was appealed, that the onus was upon the accused to satisfy them on a balance of probability of the honesty and reasonableness of his belief. It was held by a three to two majority of the Full Court that the onus had been properly laid on the accused. Mr. MacDougall agrees with the opinion of the minority, to the effect that the onus of proof remained on the prosecution in accordance with the principle laid down by the House of Lords in *Woolmington* v. *D. P. P.*[4] Bigamy, as he points out, is an offence which attracts a considerable moral and social odium, even though the penalty imposed may be light. A layman familiar with " the benefit of the doubt " is likely to find the task of convicting a person whose explanation may well be true, but legal proof of which is incomplete, repugnant to his concept of justice.

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[1] Macdonald on *Criminal Law* (5th ed.), 147; Hume I, 461; Alison I, 539; *Norman McDonald* (1842) 1 Broun 238.

[2] (1889) 23 Q.B.D. 168.

[3] [1921] 2 K.B. 119.

[4] [1935] A.C. 462.

According to the classical authors, the rule as to the onus of proof where such a defence is put forward to a charge of bigamy is the same in Scotland as in Victoria. Thus Macdonald,[5] following Hume[6] and Alison,[7] states that the accused must prove that reasonable grounds existed for believing that the other spouse was dead at the time of the second marriage in order to escape conviction. The case he refers to, however, *Norman MacDonald*, is of no value on the question of onus of proof, for the charge was dropped on the suggestion of the court when the evidence led by the prosecution disclosed that a genuine mistake of fact had occurred. It is open to doubt whether nowadays the onus would be held to lie upon the accused in the light of recent cases where the subject has been raised in relation to other criminal charges. Malice, says Hume, is implied prima facie in the act of intentional killing and it lies therefore with the panel to overcome this presumption by evidence on his part.[8] Alison writes in similar terms.[9] It is clear that this is no longer a correct statement of the law. *Hillan* v. *H.M. Advocate*[10] and *Owens* v. *H.M. Advocate*[11] establish that, when a special defence of self-defence or provocation is put forward in answer to a charge whether of murder or assault, it is not incumbent on the accused to prove either that he acted with justification, or reasonably believed he so acted. It is enough if he raises a doubt, the burden being throughout on the Crown to bring home guilt to him and there being no onus on him to prove his innocence. The principle thus established is of great importance, and is not confined to a defence of self-defence or provocation,[12] but it remains uncertain how far it extends. If it is sufficient for an accused on a charge of murder to raise a doubt whether he may not have reasonably believed he was in imminent danger, though in fact he was mistaken, in order to be acquitted, are accused persons on other charges, where genuine and reasonable mistake would be a defence, entitled to the benefit of the same rule? It is very difficult to see why they should not be. Further, is it always open to an accused, whenever *mens rea* is a necessary ingredient of an offence, to say that the burden of showing beyond reasonable doubt that it is present rests with the prosecution?

In so far as a defence of self-defence is concerned, there is no difference between the rule as to the onus of proof laid down in *Hillan* v. *H.M. Advocate* and *Owens* v. *H.M. Advocate* and the rule established in England by *Woolmington* v. *D. P. P.* (*supra*), *Mancini* v. *D. P. P.*[13] and *Chan Kau* v. *The Queen.*[14] But, although the High Court of Justiciary in both the former cases plainly had *Woolmington's* case in mind, they did not explicitly refer to it. Perhaps the reason was that they did not want to commit themselves to the proposition stated by Lord Sankey L.C., to the effect that, subject to the defence of insanity and to any statutory exception, the onus of proof never in any case is shifted from the prosecution to the defence. This proposition may possibly be on the broad side as a statement of English law. It would require more boldness to apply it to the law of Scotland. The position would appear, for example, to be less favourable to the accused in this country with respect to the doctrine of recent possession on a charge of theft or reset. *R.* v. *Schama*,[15] which was expressly approved in *Woolmington's* case, decided that no onus of proof lies on a person found in possession of goods recently stolen to give an account of his possession of them which the jury are convinced is true. It is enough for him to offer an explanation which might reasonably be true and is consistent with innocence. If he fails to offer a reasonable explanation, the jury may (not must) find him guilty. On the other hand the High Court of Justiciary in *Fox* v. *Patterson* [16] accepted the argument that, assuming possession of goods recently stolen and other incriminating circumstances of some kind, the onus of proving his innocence lies upon the accused. If the Crown succeeds in establishing a prima facie presumption against him, he can escape conviction only by "positively excluding every element of guilt." [17]

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[5] 5th ed., 147.

[6] I, 461.

[7] I, 539.

[8] I, 254, and see I, 257.

[9] I, 48–49.

[10] 1937 J.C. 53, S.L.T. 396.

[11] 1946 J.C. 119, S.L.T. 227.

[12] *Lennie* v. *H.M. Advocate*, 1946 J.C. 79, S.L.T. 212.

[13] [1942] A.C. 1.

[14] [1955] A.C. 206.

The court, in placing the onus of rebutting the presumption of guilt on the accused, purported to found on statements of the rule of recent possession of stolen goods made by Hume, Alison and Dickson on *Evidence*. But it is difficult to discover either in these writers or in any of the cases cited to the court a clear expression of opinion on the question. Hume states that recent possession of stolen goods, together with other material circumstances, "will and ought to be held a relevant ground of conviction." [18] Alison states that, unless the accused explains his possession in some way consistent with his innocence, "it almost always leads with sensible juries to conviction."[19] But it is one thing to say that, unless an acceptable explanation is offered, the jury may convict. It is quite another thing to say that, in order to avoid being convicted, the accused must give an explanation and prove it to be true. Hume [20] and Alison therefore do not appear to support the view that the onus of proof is shifted from the prosecution. Dickson, again, rejects any general rule to the effect that recent possession of stolen goods lays on the accused the burden of proving that he acquired them honestly.[21] The usual formulation of the rule is that given by Macdonald,[22] namely, that recent possession of stolen property in the absence of reasonable explanation is sufficient evidence for conviction. "A reasonable explanation" is not necessarily a true explanation. It is one that may or may not be true, and is not shown beyond reasonable doubt to be false. This formulation was, however, criticised by the Lord Justice-Clerk in *Cryans* v. *Nixon*,[23] as being less full and precise than that given by the Lord Justice-General in *Fox* v. *Patterson*, and the opinion was repeated that, where sufficiently incriminating circumstances were established, the onus of proof shifted to the accused. It might be suggested that the formulation in *Fox* v. *Patterson* is not so much fuller and more precise than the other, so far as the onus of proof is concerned, but rather inconsistent with it. Are we then to conclude that the latter, since *Fox* v. *Patterson*, is incorrect? The question is doubtful, since the opinions of the Lord Justice-General in that case and of the Lord Justice-Clerk in *Cryans* v. *Nixon* were *obiter*. In both cases the incriminating circumstances required to bring the presumption of guilt into operation were held to be lacking.

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[15] 11 Cr.App.R., 45.

[16] 1948 J.C. 104, S.L.T. 547.

[17] *Per* the Lord Justice-Clerk at p. 108.

[18] I, 111.

[19] I, 320.

[20] See however I, 117.

[21] I, § 157.

[22] 5th ed., 336.

It may be that the practical application of the rule of recent possession is not usually more unfavourable to an accused in Scotland than in England, for in general the prosecution will seek to establish affirmatively that the accused gave an unsatisfactory explanation of his possession of the stolen property in order to show the necessary incriminating circumstances. But it is surely undesirable in principle that, dishonest intent being of the essence of theft and reset, accused persons should be obliged to prove their honesty once a prima facie case has been made out by the prosecution. Their position is worse than it would be in England if such a rule prevailed there, because of the need for corroborative evidence. Presumably the jury ought to be directed, where the accused gives unsupported evidence on his own behalf, that even though they believe him the defence must be rejected owing to lack of corroboration and further they must dismiss it entirely from their minds. It scarcely makes sense that this should be the rule where a possessor of stolen goods maintains his bona fides, while one on a similar charge who puts forward a defence of alibi can argue on the authority of *Lennie* v. *H.M. Advocate* (*supra*) that, even if his defence fails for a similar reason, the alibi evidence may be used to induce a reasonable doubt of whether the Crown has proved his guilt.

According to Macdonald,[24] on a charge of theft if the accused believes that the property is his, or that he took it with the owner's consent, he is not guilty of theft. But his belief must be reasonable and he must prove it. This statement was quoted with approval by the Lord Justice-Clerk in his charge to the jury in *Dewar* v. *H.M. Advocate*,[25] and on appeal the Lord Justice-General said that the onus of showing that the accused had rational and colourable grounds for believing that he was entitled to remove the property had been rightly placed on him. But the question of onus of proof was dealt with only incidentally in the appeal. The Lord Justice-General doubted whether in the circumstances reasonable and honest belief was a relevant defence, and considered that the presiding judge had taken a lenient view in leaving it to the jury to decide. After referring to the onus of proof he went on to point out that on the accused's own admission he had no real foundation for any belief that he was entitled to remove the property. Lord Moncrieff was of opinion that the defence was irrelevant, and amounted to no more than saying that a theft is not to be regarded as a theft and is not criminal because it is in constant repetition by others. He did not mention onus of proof. The third member of the court delivered a concurring opinion. The case therefore was not one in which there could be an obligation on the presiding judge to direct the jury that, even if the defence failed, they must still consider whether any doubt remained as a result of the evidence on this point whether the Crown had proved guilty intent on the part of the accused. *Dewar* v. *H.M. Advocate* is authority for the proposition that a defence of this kind does not avail unless the accused's belief is both honest and reasonable. But it hardly seems to go further.

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[23] 1955 J.C. 1 at p. 5; 1954 S.L.T. 311.
[24] 5th ed., p. 18.
[25] 1945 J.C. 5, S.L.T. 114.

Leaving *Dewar* v. *H.M. Advocate* aside, it cannot be said that much support is to be found for the statement by Macdonald that the onus lies upon the accused to prove this defence. The passage referred to in Hume [26] is silent on the onus of proof. In *John Sanders* [27] the jury were directed, that, if the accused had a serious and rational belief that the property was his own, the case was not one of theft, but that they were to consider if it was " proved or credible " that he had such a belief. It might be credible without being proved, and all the jury were told was that there must be some evidence to substantiate the defence, not that the accused must prove it. *Costello* v. *Macpherson*,[28] on which Macdonald also relies,[29] is no better support for the view expressed. The accused in that case was found in possession of some coal and volunteered the statement that he had got it from a bunker belonging to a railway company. He gave no evidence at the trial and called no witnesses in defence. It was held not to be necessary for the prosecution to prove to whom the coal belonged. If, said the Lord Justice-Clerk, the accused meant to say he had got the coal by some legitimate means, or even to say that he had reasonable ground for believing that it was his own, he was the only person who could give that evidence. When he refrained from giving any such explanation, the magistrate was entitled to believe that no such explanation could honestly be given. The natural implication would appear to be that, if the accused had given evidence that he thought he had a right to take the coal, and the magistrate had believed him, he would have been entitled to acquit the accused in spite of the absence of corroboration.

It is sufficiently clear, from what the classical commentators on our criminal law say about onus of proof, that they do not distinguish between onus of proof in the proper sense, that is the burden of establishing guilt or innocence, or of proving some particular matter of fact, like a special defence, on the one hand, and what has been called the " evidentiary burden " of adducing evidence at some stage of the trial, on the other hand.[30] The phrase " evidentiary burden " is not altogether apt, because it is not a burden of proof nor even necessarily a burden of adducing evidence in rebuttal of the prosecution case. All it means is that in certain circumstances a presumption arises which enables the prosecution to establish guilt unless the accused can point to some evidence, given either for the prosecution or for the defence, which creates a doubt and therefore displaces the presumption. In other words, the prosecution is not bound to anticipate and disprove every possible defence open to the accused, but only to show that on the whole evidence led there can be no reasonable doubt as to his guilt.

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[26] I, 74.

[27] (1837) Bell's Notes, 20.

[28] 1922 J.C. 9, S.L.T. 35.

[29] See 5th ed., p. 301.

[30] See Phipson on *Evidence*, 9th ed., pp. 32–34.

The distinction between onus of proof and the so-called "evidentiary burden," illustrated by the cases of *Woolmington* and *Owens*, is a modern refinement, although the Lord Justice-General in the latter case denied that any novelty of practice was being introduced into our law. It is not therefore surprising that writers like Hume and Alison do not appreciate it. The view that a legal presumption, such as the presumption that a person intends the natural consequences of his acts, might shift the onus of proof from the prosecution to the defence was held by English writers like Foster, Blackstone and East of the eighteenth and early nineteenth centuries, and the law stated by them was regularly applied in the courts until quite recently.[31]

Thus in *R.* v. *Tolson* (*supra*) Cave J. expressed the opinion that the accused must prove facts from which honest and reasonable mistake could be inferred. But it has been suggested that as a result of *Woolmington's* case this opinion is no longer correct.[32] It can scarcely be denied that, at least in theory, the trend in Scotland has been similar. In theory, because actually it would be difficult to find a reported case where an accused has been convicted on the ground that he has failed to discharge the onus of proving absence of *mens rea*. It is significant that Dickson, while laying down the rule that the prosecution may shift the burden of proof by proving facts which lead to a legal presumption of guilt, adds the qualification that too much reliance should not be placed on such a rule, and effect should always be given to a reasonable ground for inferring innocence even though the balance of probability points in the opposite direction.[33] It was presumably this consideration which the Lord Justice-General had in mind when he observed in *Owen's* case that no novelty of practice was involved in the opinion of the court.

On the other hand, it is impossible that any clear and consistent rule about onus of proof should be established unless the underlying principles involved are examined, and unless courts are given some guidance as to how far the opinion of the court in *Owens'* case extends, and whether the law of Scotland coincides or not with that of England as laid down in *Woolmington's* case. If our law is to retain its reputation for fairness to accused persons, it may be found that, particularly in regard to recent possession of stolen goods, the question of onus of proof needs to be reconsidered. It is all very well to say that in practice injustice rarely or never occurs, and that, as Dickson recommends, courts are in the habit of being sympathetic to the accused. But that is hardly good enough. And does Dickson's recommendation not just amount to this, that a judge should say to the jury, "the prosecution having proved possession by the accused of goods recently stolen in incriminating circumstances, it is for him to prove his innocence. That means that he must give an explanation for his possession of the goods which you are satisfied is a true explanation. If he cannot do that, you are in law bound to convict him. I should add that it is required by our system of justice that accused persons should not be convicted unless the evidence against them is very clear and weighty. Therefore do not take what I have just said about the law too seriously"?

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[31] See Russell on *Crime*, 11th ed., I, 37.
[32] Russell on *Crime*, 11th ed., I., 75.
[33] I, § 37.

SUMMARIES

By S. G. KERMACK, C.B.E., M.A., LL.B., Advocate, Sheriff-Substitute of Renfrew and Argyll at Oban.

COMMON AND STATUTORY LAW

Professor Douglas Payne of Harvard in *The Modern Law Review*, July, 1958, in a study of the Occupiers' Liability Act, 1957, is not sure of the success of the principles substituted for the distinction between invitees and licensees.

In *The Law Quarterly Review*, July, 1958, Professor Goodhart, featuring *Davie* v. *New Merton Board Mills, Ltd.*, writes on "A Master's Liability for Defective Tools."

"Malice in the Law of Torts" by Mr. G. H. L. Fridman, in *The Modern Law Review*, July, 1958, criticises the ambiguity of the word malice and looks forward to the development of a wrong of intention.

"The Concept of Market in the Sale of Goods" by Mr. D. L. M. Waters of University College, London, in *The Canadian Bar Review*, September, 1958.

CONSTITUTIONAL AND ADMINISTRATIVE LAW

The *Journal of the International Commission of Jurists*, Spring–Summer, 1958, carries an article by Mr. Darga Das Basu, Joint Secretary to the Government of India, on "Protection of Civil Rights in India." Similarly, it gives from the pen of Professor Stephan Hurwitz, himself the Danish Parliamentary Commissioner for Civil and Military Government Administration, an account of this novel institution for the inspection on complaint or *ex proprio motu* of any office under the State. This author also has an article on the same subject in *Public Law*, Autumn, 1958.

Professor McWhinney of Toronto, in an article "The Great Debate" in *The New York University Law Review*, June, 1958, considers the present position regarding constitutional restriction of legislation and related topics.

In *Public Law*, Autumn, 1958, Lord Chorley deals with the "House of Lords Controversy," while Professor Northey of Auckland University considers the position in New Zealand as "An Experiment in Unicameralism."

Mr. S. A. de Smith writes in *The Modern Law Review*, September, 1958, with restraint, on Parliamentary Privilege.

CRIMINAL LAW

In *The Modern Law Review*, July, 1958: " Automatism and Criminal Responsibility " by J. Ll. J. Edwards of Queen's University, Belfast.

" Compulsion as a Defence to Criminal Prosecution " by George Hersey and Alfred Aviers, both of Rutgers University, a subject which has been comparatively neglected, appears in *The Oklahoma Law Review*, August, 1958.

FOREIGN AND COMPARATIVE LAW

In *The Modern Law Review*, July, 1958, Mr. C. Howard on the civil claim in criminal actions in French law, particularly the occasional danger of its abuse.

The American Bar Association Journal, May, 1958, compares the American Lawyer, Referral Service and the English Legal Aid Act.

The *Revue Internationale de Droit Comparé*, April–June, 1958: Dr. P. Moral López on Agricultural Leases in Comparative Law.

Monsieur Pierre Siré in the *Journal of the International Commission of Jurists*, Spring-Summer, 1958, gives an account of " The Bar in France " and incidentally of the French courts, not without Gallic humour.

In *The Modern Law Review*, September, 1958, M. Jean de Givry of the International Labour Office writes of the " Legal Effects of Collective Agreements from a Comparative Law Aspect."

The *Revue Internationale de Droit Comparé*, July–Sept., 1958, contains a good choice of articles on foreign systems. Professor Lobin of Aix-Marseille reviews the Italian Civil Procedure Code of 1942. Dr. Fridieff of Paris University deals with the Soviet Law of " responsabilité civile " (liability) which has a surprising similarity to Western principles. The question between internal and expressed intention in Islamic law according to the two schools of doctrine, hanafite and malakite, is treated in theory by Professor de Bellefonds, formerly of the French Institute in Egypt, while Rabbi Grajevsky of Jerusalem treats of the struggle to reach a compromise in Israeli law on Marriage and Divorce between the Talmudic religions and the more modern views.

INTERNATIONAL LAW

In *The American Journal of International Law*, July, 1958, Messrs. McDougal and Lipson of Yale, " Perspectives for a Law of Outer Space."

JUDICIAL ADMINISTRATION

In the *American Bar Association Journal*, August, 1958, Judge Warren E. Burger discusses the work of the Judicial Councils in the U.S.A. to speed up the hearing of cases.

LABOUR LAW

Mr. Benetar of the New York Bar puts forward the importance of the Lawyer's Rôle in Labour Management Relations in the *American Bar Association Journal*, August, 1958.

LEGAL ETHICS

In *The New York University Law Review*, May, 1958, Mr. William M. Kaplan writes on " Forgotten Canons " and on the reasons why they are forgotten in America.

SCOTS LAW

In *The Conveyancing Review*, August, 1958, Mr. J. G. S. Cameron, Lecturer in Conveyancing in Edinburgh University, on the " Law of the Tenement."

SUPRANATIONAL LAW

In the *Journal of the International Commission of Jurists*, Spring–Summer, 1958, the Deputy-Director and the Secretary of the Directorate of Human Rights of the Council of Europe give a very interesting account of the procedure and decisions of that body since its establishment in 1955 when the necessary six members accepted its competence, showing that the applicants, though largely unsuccessful, have not as feared formed a platform for subversive propaganda.

Periodicals also received: *Revista Jurídica de la Universidad de Puerto Rico*, *The Canadian Bar Journal*, *Textes Législatifs Étrangers* (Brussels), *Documentation Juridique Étrangère* (Brussels), *La Justicia*, *Western Political Quarterly*, *Jus* (Milan), *Indian Law Quarterly Review*, *Soviet Legal Information Bulletin*, *British Tax Review*, *Revista del Foro* (Lima).

RECENT LITERATURE

The Sanctity of Life and the Criminal Law. By Glanville Williams. 1958. London: Faber and Faber, Ltd. Price 30s. net.

A new work from the versatile and prolific pen of Dr. Glanville Williams will always be greeted with a keen sense of expectancy and in some quarters with even a degree of trepidation. These sensations will not be disappointed by the present volume in which he ventures on that highly debatable ground where law, medicine and theology intersect. Literally, matters of life and death are his theme; and one by one he takes the very topical problems of infanticide, birth-control, sterilisation, artificial insemination, abortion, suicide and euthanasia, subjecting each to an incisive and comprehensive examination. Lawyer though he is, he does not hesitate to treat of the sister disciplines and to upbraid them where he thinks it necessary.

" One by one " may suggest what for at least one reader is the major weakness of this book. Dr. Williams is an adherent of the rationalist approach to the problems of human existence which in recent years many have come to associate with the name of the indefatigable Mrs. Knight. So much we may gather from his reiterated appeals to " commonsense ethics," " the utilitarian ethic," " utilitarian philosophy," " contemporary commonsense." But nowhere does he attempt to formulate any coherent statement of the scale of values against which he evaluates the medico-legal operations which are his theme. " Let's make it legal " is, in effect, his constant plea. A preliminary confession of faith and a final chapter attempting a synthesis of the legal and ethical issues underlying each separate topic would have lent a better balance to the book. In fairness, however, it may be pointed out that its present somewhat fragmentary nature may be traced to the exigencies of its original lecture-form, for it is based on a series of addresses given at Columbia University, New York, in 1956.

This reticence on the part of the author is something of a handicap to the reviewer, who has the misfortune to differ from him in his approach to almost all these questions but is willing to be convinced of his errors. It may, however, be pertinent to make the following comments. Firstly, whether one calls it a vestige of medieval obscurantism or the intuition of *animae naturaliter christianae*, there is in the British people a certain in-built predisposition towards the Christian moral tradition; and law reformers cannot afford to ignore it if they are to secure that degree of public acquiescence which is essential to the proper functioning of any law-system. One sees it in the uphill battle of the so-called " Family Planning Association," in the revulsion of feeling that surrounds a suicide, in the resort to " Days of Prayer " in times of national emergency. It is a phenomenon which, as sociologists have often demonstrated, has nothing to do with regular church-going. In his discussion of " involuntary euthanasia " (an unhappy phrase verging, one would think, on an oxymoron) Dr. Williams shows his awareness of this factor, in writing of the danger of inflicting " a traumatic injury upon the accepted code of behaviour built up by two thousand years of the Christian religion " (p. 310); but his earlier chapters display a somewhat cavalier disregard for that same tradition.

Secondly, while the teachings of theologians may seem at times speculative and even contradictory (though the near unanimity of condemnation in the current A.I.D. controversy may have surprised some) yet the conclusions of scientists, both natural and social, often afford no firmer basis for legal enactment. There is, for example, a wide difference of opinion on the capacity of the world for increased food production and on the effect of a rising standard of living on the birth-rate; the indications for therapeutic abortion have altered considerably in recent years in favour of the preservation of life; and there has been a remarkable advance in pain-killing drugs since the last war—to touch only upon matters relevant to the present work. Legal certainty demands a firmer basis.

Thirdly, if law is to be cut off from the ethical experience of centuries and hitched instead to the findings of the physical and social sciences, as mediated by self-styled humanitarians, what should take the place of that moderating influence of Christian morality which teaches the infinite value of each human soul as a unique creation destined for eternity? It is perhaps not without significance that the final paragraphs of this book cite with no show of abhorrence by the author certain proposals to exterminate (painlessly, of course) defective children. Few now expect the civil law to be more than an imperfect reflection of the moral law, but the total separation of the two leaves no defence against tyranny; and today the unconscious tyranny of the dedicated scientist can be infinitely more terrible than the misrule of the old-fashioned despot.

Turning to matters of detail, one is bound to note that Dr. Williams' customary precision seems to desert him when he enters the less familiar realms of ethics and theology. Carried away at times by the vigour of his own polemic, he has allowed an inaccuracy to creep in which he would rightly condemn in a purely legal work. Thus, in discussing the objections of theologians to birth-control, he remarks, " Of course, the generation of offspring is impeded by every person who chooses to remain celibate, but Aquinas did not discuss this aspect of the question " (p. 60). To anyone with the scantiest acquaintance with St. Thomas's didactic method and his scrupulous regard for his adversaries, whose objections he was said to formulate better than they themselves could, such a statement must be at once suspect; and the objection is in fact made and met in a *quaestio* adjacent to one cited by Dr. Williams (*S.Theol.* IIa, IIae, 152, 2). Nor does he seem to have grasped the significance of the assertion that a practice is " unnatural " or " against nature," which he thinks to controvert with the rather banal argument that " nature evidently intends males to have beards, which intention they steadily frustrate by the use of the razor " (p. 65) and by other objections on a similar level. Living in accordance with nature does not mean leaving the processes of the physical universe to unfold without interference or restraint, but the use of our faculties in accordance with the ends for which reason, conscience and revelation teach us they were formed. So far from being

" extremely primitive if not blasphemous theology " and " personifying nature " (*ibid.*), it presupposes God's existence and his claims upon us as Creator and no more detracts from them than does the concept of natural law itself. Again, the author is apparently under the misapprehension that the term " Immaculate Conception " signifies the Virgin Birth (p. 132). He would seem to conceive that original sin is a transmissible physical characteristic (p. 28). He cites as if it were orthodox Christian doctrine the erroneous opinion of a certain St. Fulgentius that a child dying in the womb is condemned to the pains of hell, an opinion which he himself in an earlier article, in 1952 *Current Legal Problems* 128 at 139n, had rightly described as " no longer the official attitude of any Church." St. Alphonsus (born 1696) becomes " a Catholic theologian of the nineteenth century " (p. 286). A truly remarkable oversight is the failure to make any reference to Henry Davis's *Moral and Pastoral Theology*, for the past quarter-century the authoritative Catholic work on its subject throughout the English-speaking world, or to any comparable Protestant work, such as Volume III, 4 of Barth's magisterial *Church Dogmatics*, both of which would have quarries of relevant material.

However, Dr. Williams has found a more congenial guide through the dark places of theology in the person of that eminent Victorian, W. E. H. Leckie, on whose *Spirit of Rationalism* (first published 1865) and *History of European Morals* (1869) he relies heavily for his account of, *inter alia*, infant baptism. He would have found better examples of modern scholarship on the subject in the widely recommended Report presented by Professor Torrence's Committee to the General Assembly in 1956 or in the studies published in the *Downside Review* during 1954–55. The former work might have disabused him of the notion that the necessity of infant baptism is the " invention of Origen " (p. 178). The subject is introduced merely in order to explain historically the theologians' ban on infanticide and abortion; but it is not primarily " the horror of bringing about the death of an unbaptised child " (*ibid.*) which produces this attitude, but the application of the Commandment " Thou shalt not kill," interpreted as " Thou shalt not take (any) innocent human life." By underplaying this aspect, a false emphasis is created. Dr. Williams, like the devil (if he will pardon a cliché which comes readily to mind), is not slow to cite scripture for his own purposes; but then, in enlisting support for his cause, he is ready to cast a very wide net indeed, even invoking the authority of the readership of the (*Women's?*) *Sunday Mirror* to back up his advocacy of legalised abortion (p. 203n). Yet when he casually dismisses two thousand years of scholarly controversy in speaking of practices " in gross misinterpretation of the plain teachings of the New Testament " (p. 35) one feels that a little modesty would not come amiss.

In the legal and medico-legal spheres one is at once struck by the great wealth of citation. The author has marshalled a truly impressive range of authorities from many parts of the globe, though naturally American references predominate, many of them not readily available in this country. It would have been of interest, however, to learn what were the considerations which led an avowedly secularist State such as France (and Belgium might have been added) to adopt a "reactionary policy" on birth-control (p. 49). Its results might also have been illuminating, though perhaps not altogether consonant with the general thesis of the book. The Scottish law of suicide receives sympathetic consideration from Dr. Williams, who has always been conspicuous among English academic lawyers for his awareness of Scots law. The celebrated A.I.D. case (*MacLennan* v. *MacLennan*, 1958 S.L.T. 12) was too recent to receive his attention but we gather that the author would agree with Lord Wheatley's decision, though not necessarily with all his reasoning. The much-debated direction by Macnaghten J. in *R.* v. *Bourne* [1939] 1 K.B. 687, naturally looms large in his discussion of therapeutic abortion. It is a case which has always stood higher in the estimation of lawyers than physicians, who, of course, have personal reasons for taking a cautious view. But Dr. Williams' detailed analysis, reproducing in part his article in *Current Legal Problems* (*supra*), should, when coupled with the recent direction by Ashworth J. in *R.* v. *Newton and Stungo* [1958] Crim. L.R. 469, do much to reassure them as to the current state of the law. One feels more doubt, however, about the author's advice, in defiance of a very substantial weight of medical opinion, that a physician need not obtain the husband's consent before performing an operation of this kind (p. 171). The doctrine of the unity of the spouses is not yet dead and may still revive, for there are signs of a revulsion from the excessive individualism of married life in the past few decades. It may be that in this case their daily contact with human life at an intimate level has given the doctors a better sense of the fitness of things and, by a kind of instinct, of the law also.

All these questions are matters upon which the lawyer too readily abdicates to others his own responsibility, and Dr. Williams deserves our gratitude for confronting us with them in a work that bears all his characteristic sparkle and forthrightness; a work, nevertheless, to be praised for the questions it raises, rather than for the answers it gives and does not give.

I. D. W.

Deans' List of Recommended Reading for Prelaw and Law Students. Compiled and edited with annotations by Julius J. Marke. 1958. New York: Oceana Publications (Docket Series, Volume 11). Price U.S. $3.50 net.

It is a common practice in American law schools to issue to law and prelaw students a list of recommended reading "to give some orientation and background to legal thinking." The learned editor of this volume has gathered lists from 73 American law schools, including such famous schools as Columbia, Harvard, Northwestern and Tulane, while other law schools, he reports in the preface, were interested in his project but could not co-operate as they did not themselves issue prepared lists.

The compilation of any such list is necessarily an individual matter so that no two law teachers would be likely to frame exactly the same list. The extent of agreement among different schools in recommending particular titles is indicated after each book by a key number referring to the list of co-operating schools. This indicates that among the commonest suggestions are A. P. Herbert's *Uncommon Law*, Mason's *Life of Brandeis*, Bowen's *Yankee from Olympus* (Holmes), *The Life of Charles Evans Hughes*, Beveridge's *Life of John Marshall*, Swisher's *Life of Roger B. Taney*, *The Federalist*, Beard's *Rise of American Civilisation*, Cardozo's *Selected Writings*, Frank's *Law and the Modern Mind*, Holmes's *Common Law*, Maine's *Ancient Law*, Pound's *Introduction* and his *Spirit of the Common Law*, Plucknett's *Concise History* and Llewellyn's *Bramble Bush*. In all, the 73 schools suggested almost 700 titles and the editor has grouped these under general subject-headings and annexed to each a useful note on the scope of the book, sometimes with a reference to a review.

The reviewer has two main criticisms: in the first place, how far are these and many other of the books mentioned suitable for prelegal or background reading? Some seem appropriate for the third-year man but likely to be baffling for the student about to start or starting law. Secondly, the boundaries between subjects are certainly vague and indefinite, but it is hard to see why headings such as Criminal Law and Procedure, International Law and Real Property need appear in this kind of list. The recommending of books on such topics surely belongs to the courses on these topics, and surely it should extend not merely to textbooks and case-books but to relevant background material. Would it not be better to confine such a list of recommended reading to matters and books not likely to be dealt with in any course but valuable for background, such as history, sociology and philosophy? These topics and others are in this list though there seem to be some surprising inclusions in and omissions from the items under these and similar headings.

The actual items listed would in many cases not be suitable for law students in Scotland or England but that does not detract from the merit of the learned editor's compilation, from the interest of going through the list, or from the value of the idea. Would it not be useful in our own Law Faculties to compile and issue a list of recommended background reading? Should the Society of Public Teachers of Law not do this? On the whole the reviewer thinks that this is one of the ways in which the American law school is ahead of our own, and Professor Marke has done a very useful service in compiling this volume.

David M. Walker.

The Advocate's Devil. By C. P. Harvey, q.c. With a Foreword by the Rt. Hon. The Viscount Monckton of Brenchley, k.c.m.g., k.c.v.o., m.c., q.c. 1958. London: Stevens & Sons, Ltd. Price 12s. 6d. net.

This book is not, as its title may suggest, a practical handbook for those just about to embark on a career at the Bar: it is rather a set of personal observations, spiced with wit and penetrating comment, based on a lifetime of experience in the law. Many cherished idols, such as the sanctity of the common law and the law of evidence are ruthlessly attacked. For instance, the law of evidence is described as "founded apparently on the propositions that all jurymen are deaf to reason, that all witnesses are presumptively liars, and that all documents are presumptively forgeries. It has been added to, subtracted from and tinkered with for two centuries until it has become less of a structure than a pile of builder's débris." All this makes very entertaining reading. Some of the seasoned old anecdotes about barristers and the tricks of their trade are repeated, but there are some new ones too. Although the book is lighthearted in tone and one feels that the author has his tongue in his cheek at least half the time, there is a leavening of serious thought which makes it most stimulating to read.

N. G.

Russell on Crime. Eleventh Edition. By J. W. Cecil Turner, M.C., M.A., LL.B., of the Middle Temple, Barrister-at-Law, Fellow of Trinity Hall, Cambridge. 2 vols. 1958. London: Stevens & Sons, Ltd. Price £10 10s. net.

This work makes a timely reappearance under the experienced editorship of Mr. Turner. Eight years have elapsed since the publication of the tenth edition, and many new cases have to be noted. Also it is necessary to consider the impact of various statutes, especially the Homicide Act, 1957, which, apart from its provisions regarding punishment, substantially introduces to England the Scottish doctrine of criminal responsibility.

Mr. Turner has done these things and much more besides. The scheme of rearrangement originally planned for the tenth edition has now been carried through. Offences relating to the law of nations and those against the revenue and religion are relegated to the second volume, while the important topics of accomplices in crime and incitement and attempt (the former rewritten and extended) now figure in the first. These changes are greatly for the better. It was not logical that one should pass almost directly from considering the law relating to criminal responsibility to chapters on piracy and dealing in slaves.

Russell on Crime has always been more than a mere textbook, and the present editor has spared no pains to maintain its quality as a philosophic treatise. He has extensively revised the chapters on embezzlement and fraudulent conversion in order to set forth clearly what he considers to be the principles underlying these crimes. He has largely rewritten and greatly extended the chapter dealing with criminal responsibility, and has meticulously revised the entire work. Despite these many alterations the present edition is sixty-six pages shorter than its predecessor, its greater bulk being due to thicker paper.

Lord Aitchison once said that *Russell on Crime* was the best book on criminal law ever written. It does not lose with the passage of time.

F. C. W.

Family Law. B. E. L. Johnson, M.A., LL.B.(Cantab.). 1958. London: Sweet & Maxwell, Ltd. Price 35s. net.

Family law, for long neglected by English legal writers, is now a focus of their interest and several recent works have been devoted to the subject.[1] Mr. Johnson adds to this literature a manual designed for law students.

His book commences with an introduction in which a dozen pages devoted to an historical outline of marriage are followed by an examination of the problems of domicile and jurisdiction in family matters. The four main parts of the book follow dealing respectively with the preliminaries to marriage, the legal effects of marriage, its termination, and the law relating to children. Two appendices complete the work, one dealing with the consents required for the marriage of an infant and the other giving a table of the prohibited degrees.

It clearly was not possible for the author in a mere 310 pages of text to offer the reader a very searching analysis of each and every question entered upon, and not all readers will agree with the author's selection of points to be discussed in detail and of matters to be treated more summarily. In general, however, Mr. Johnson's work cannot be dismissed as a superficial one: his exposition of modern developments in family law is very clear and, if his treatment of its historical evolution is sometimes a little too compressed, the author has not failed, whenever the opportunity offered, to explain clearly the nature and significance of its present institutions. In conclusion, *Family Law*, though a serious study, is one which is very readable.

MAURICETTE CRAFFE.

Le Droit de l'Ile de Jersey. By R. Lemasurier. 1956. Paris: Ed. A. Pedone.

It is with diffidence that any lawyer should undertake review of a work treating of a legal system with which he has but slight acquaintance. The present reviewer has indeed visited Jersey, and has discussed her laws with leading jurists there; but he necessarily approached Dr. Lemasurier's work as a Scots lawyer seeking enlightenment rather than as an authoritative critic. This much he knew already—the laws of Scotland and of Jersey are particularly cherished by the lieges as outward manifestations of a sense of community. Both systems have also been exposed through centuries to the assimilating influences of English law and politics. Again, both in Jersey and in Scotland, dearth of adequate modern legal literature favours the Common Law constrictor. Dr. Lemasurier's book is not a textbook nor a detailed exposition of the laws of Jersey. On the contrary, it is a study of astonishing range within the compass of some 340 pages—covering the social, political, economic and legal history of the Island from earliest times to the present day. Concerned to explain the evolution of a legal tradition or climate of a "*milieu juridique*" rather than legal institutions in isolation, the author has treated his subject comprehensively and with scholarly attention to existing materials. His work indeed provides a new starting point for those who are attracted to the study of Norman institutions. The law of Jersey is, above all, Norman customary law, developed during a long and varied history, moulded by and moulding a self-contained ethnic group. The interaction of external factors (*le milieu extérieur*) and internal factors (*milieu intérieur*) in the development of law and group consciousness is at the heart of the author's thesis. Encroachment on the principles of the law of Jersey by Order in Council and by decisions of the Privy Council has its counterpart in the legislative actings of the British Parliament and the judicial actings of the House of Lords in Scottish affairs. The French language which, as in Quebec, was a major factor in maintaining tradition and a sense of community, has in Jersey today been replaced by English as the official language of the courts. The evacuation of the Island's children to Britain between 1940 and 1945 has, moreover, created a gap in the language tradition which may never be bridged.

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[1] *Family Law*, by Jack Hamawi (1953); *A Century of Family Law*, 1857–1957, edited by R. H. Graveson and F. R. Crane (1957); and *Family Law*, by Peter Bromley (1957).

The book as a whole is divided into three sections, the earliest period, 1204–1771, and 1771 (the era of constitutional codification) to modern times. The evolution of feudal and customary law is traced with care and lucidity, and, apart altogether from its value in a study of the laws of Jersey, the author's discussion of custom as a source of law is of general interest and importance to students of legal history and jurisprudence.

The author's examination of the present constitutional and international status of the Channel Islands is stimulating. They have never been colonies nor part of England—but are possessions of the King or Queen of Great Britain (in earlier times the King or Queen of England). If the status of the Islands in relation to Great Britain is that of personal Union, then—as in the case of Scotland before 1707—no law-making body but their own could lawfully impose laws. This issue has been bitterly contested on several occasions when the British Parliament has sought to legislate for the Channel Islands, and modern practice rests on convention without compromise—as when in Scotland the Lord High Commissioner and the General Assembly formerly pronounced independently but to the same effect. Today Act of Parliament may " authorise " the making of an Order in Council to extend the provisions of the Act to the Channel Islands but this is irrelevant in the legal theory of the Channel Islands.

Yet, there is not truly a personal Union in the sense that Britain and Hanover were linked until the accession of Queen Victoria, nor are the Channel Islands a personal possession of the Queen—but rather they belong to the British Crown and are legislated for by the Privy Council, which in part is composed of Ministers responsible to Parliament at Westminster.

The unique legal and constitutional status of the Channel Islands deserves wider study than it has received so far, and will suggest interesting analogies to Scottish lawyers in particular. This present book is warmly commended both for its presentation of the legal system of Jersey and for its general value to those interested in legal history, customary law and constitutional questions.

One criticism the reviewer must stress, however. The author, who is at such pains to analyse the constitutional status of the Channel Islands, seems to have overlooked the fact that England ceased to exist as a State in international law on May 1, 1707. A second edition will, one hopes, correct the many misuses of "Angleterre" in dealing with events over the past quarter-millennium.

T. B. Smith.

Parliamentary Sovereignty and the Commonwealth. By Geoffrey Marshall. 1957. Oxford: At the Clarendon Press. Price 35s. net.

Events over the past few years have made such a book as this both necessary and possible, and it is fortunate that it has been undertaken by Dr. Marshall who has already made substantial contribution to the subject in periodicals (including *The Juridical Review*). In the present book he has continued his work and thereby has done much to help both understanding and discussion of parliamentary sovereignty. The bibliography alone bears witness to the labour which has gone into the production of a comprehensive and comprehensible book on a topic which makes such treatment particularly difficult.

As it stands, the book is of a mixed nature. Some parts are analytical and argumentative, others are mainly descriptive; sometimes it is concerned with general theory, sometimes with particular problems—the Statute of Westminster or the South African litigation involving the entrenched clauses of the South Africa Act, 1909. Some chapters are concerned with setting out the foundations and scope of the doctrine of parliamentary sovereignty, others with an attempt to discover whether there is a sovereign parliament in particular Members of the Commonwealth, such as Canada. This mixed nature in one way increases the utility of the book. Some of the "descriptive" passages make available to British readers much valuable material which many would only be able to find with difficulty. Thus, apart from the opinion which Professor E. C. S. Wade gave to the South African Government before the first *Harris* case (which is set out in an appendix), the account of, and extracts from, the debates in the South African Parliament leading up to the Separate Representation of Voters Act, the High Court of Parliament Act and the Senate and South Africa Act (Amendment) Acts, not merely indicate very clearly the nature and spirit of those debates but are in themselves the raw material for further discussion.

One does not, then, complain at all of this mixed nature of the book, though admittedly it has its difficulties. At times the reader is distracted, and surprised. His mind is following one theme and he finds that his eyes are following another; this is so in the chapter on Canada, where the problems of finding a legislative sovereign, and of self-limitation springing from the Statute of Westminster, are interwoven. The same difficulty appears in the chapter on the Asian Member States. This sort of difficulty is, however, a consequence of the subject-matter. One of the major problems of the topic of parliamentary sovereignty is to find a way of dealing with questions which are in some ways distinct, but in other ways are related. It is difficult to separate the strands of diverse arguments while at the same time allowing for their inter-relation. Thus the question, Can

Parliament bind itself? is apparently independent of the question, Can the courts pass on the validity of statute? for if the first question is answered affirmatively it does not follow that the second question must be similarly answered. Yet the two questions cannot be treated entirely separately. The opinion of Centlivres C.J. in *Min. of Int.* v. *Harris* [1952] (4) S.A. 769, was clearly influenced by the argument which may be summarised: section 152 of the South Africa Act gives some guarantees of certain rights to individuals by the process of entrenchment; unless the courts can review the validity of legislation and thus make these procedural limitations binding, the guarantees are valueless: therefore the courts will review. The connection between the two questions can also be seen in *McCawley* v. *The King* [1920] A.C. 691, 704. Yet the second question involves a variety of difficult issues from which the first is free—the existence of a title to sue, and of an appropriate remedy, are issues which are obviously relevant only to the second question. Indeed it would be perfectly possible, on other lines of argument, to regard this second question, of the rôle of the courts, as often raising issues which are " political " (in the American sense) and therefore are not justiciable, even though the first question had been answered in the affirmative.

Hitherto the denial of any possibility of judicial review in this country has been in part based upon a failure to separate these questions at all, and the dominant proposition has been that Parliament cannot bind itself and is not bound by any past statute, including the Acts of Union. Dr. Marshall's work makes the different strands of argument much clearer. More might, perhaps, have been said on one argument, namely, that which is based on the view that the Acts of Union are constituent, and therefore of a different nature from all later Acts. This argument was not fully dealt with in *MacCormick's Case*, 1953 S.C. 396; S.L.T. 255, and the uncertainties of phraseology in the opinions delivered in the Inner House have made it less easy to give any longer a certain answer on the question of judicial review in this narrower field. The relevant uncertainties are not only those contained in the sentences of the opinion of Lord Cooper dealing with the specific question of judicial review (and on them Dr. Marshall places a narrower and more certain meaning than is perhaps necessary), but also those contained in the passages in which Lord Cooper dealt with the Act of Union itself and drew attention to the variety of wording of its sections. Although these passages may be read as dealing with distinct issues, yet if weight is given to the distinction made by Lord Cooper between classes of sections in the Acts, then clearly, on the argument of Centlivres C.J., propositions about judicial review need also to be re-examined. At this stage other cases, such as the *Duke of Queensberry* v. *The Officers of State*, Mor. No. 19 Appx. Jurisdiction (which does not stand alone), become more important and call for discussion. In these earlier cases there were hints of the possibility of judicial review through the mechanism of " interpretation " which gained substantial support.

This sort of argument might perhaps have been more fully developed or explored in the present book, had some of the more general chapters followed the specific ones. Material from those later specific chapters is used in the earlier chapters, but one sometimes feels that the earlier general arguments could have been pushed farther against the background of the material provided in the later chapters. The lines of argument had to be set out early on: their full development might have been easier at a later stage.

It may be in consequence (and perhaps a fault) of being a lawyer that one looks for particular developments. For example, in the field of strictly legal argument the weight to be given to traditional cases used in this debate perhaps now needs further examination. It may be wrong to emphasise this aspect, for here the strength of purely legal argument is limited. Even when allowance is made for this, there are lines of inquiry that are worth pursuing. Thus, for example, several of the traditional cases involve private legislation, yet before there was statutory intervention and a sudden change of judicial heart in the nineteenth century there was here a background of judicial review. Admittedly the legal argument would at this point range wide and involve uncertain topics, such as the scope of the *actio popularis*. It is possible, too, that in the end it might not add greatly to clarity. Yet even when that has been said the background of the traditional cases is worth a further look. Some of the remarks about *Ndlwana* v. *Hofmeyr* made by Centlivres C.J. in the first *Harris* case could perhaps also be applied to the *Vauxhall Estates* case. Certainly the considerable background to *Edinburgh and Dalkeith Ry.* v. *Wauchope* (1842) 8 Cl. & Fin. 710, should be explored. The attitude to the old " private Acts " of the Scottish Parliament was not one of unbounded respect. Apart from the effect of the Act *Salvo Jure Cujuslibet*, such measures were capable of reduction. Indeed, specific powers to this end were given by the Parliament of Scotland in several Acts, in particular by that of 1633 c. 31 (A.P.S.V. 45), and the Court of Session continued to use these powers in respect of private Acts of the United Kingdom Parliament. Examples of this judicial examination of post-Union private Acts can be found in such cases as *Mackenzie* v. *Stewart* (1754) 1 Pat.App. 578, or *Donald* v. *Magistrates of Anderston* (1832) 11 S. 119—the latter case being a clear contrast with *Wauchope's* case. Yet between *Donald's* case and *Wauchope's*, there is a clear change of heart. No doubt, in the fullness of time, such statutes as the Evidence Act, 1845, and the Interpretation Act, 1850, contributed something to the general change. Certainly external causes must be sought; the contrast between *Donald's* case and *Wauchope's* case cannot be explained simply by reference to the forum of decision. Nor in the opinions expressed in this group of cases does the modern doctrine of the sovereignty of Parliament always, or indeed often, play a major part. Often it is entirely absent, and adherence to the views expressed in *Wauchope's* case may be otherwise explicable; it may for example also be attributed to changing views of the appropriate function of the courts. The development of the doctrine of parliamentary sovereignty may owe much to judicial reticence and to judicial reluctance to play as formative a rôle as was at one stage thought proper, a reticence and reluctance which need not endure. The exploration of such matters would, however, as has been suggested, need to be wide-ranging and might not be appropriate to this book, even though the book itself points to the need.

Certainly the book emphasises the manifold influences which have aided the formation of the doctrine. Privilege cases are brought in and the importance of the concept of Parliament as a court is brought out. There is, too, a proper emphasis on the extent to which the doctrines and ideas of parliamentary sovereignty are political in origin and how little they owe in their development to the ordinary courts. That background can be a partial explanation of judicial reticence. It can be such because on the one hand the development of a parliamentary system means that the courts can play a more passive role, and on the other hand when major issues are those of social policy that passive role of the courts may appear to be desirable. Aloofness can assist the appearance of neutrality. Yet this " political " background to the doctrine may have another aspect. There is inevitably a close, but not always obvious, link between the political views of writers and their legal conclusions. At about the time that Dicey was writing *The Law of the Constitution* (the first edition of which appeared in 1885) he was also an active participant in the debates on Home Rule, a participation which led him also to write *England's Case against Home Rule* and, later, *A Leap in the Dark* and *A Fool's Paradise*. In the first (which appeared in 1886), particularly in Chapter VII, the doctrine of parliamentary sovereignty becomes one of a bundle of sticks with which to belabour Gladstone's Home Rule Bill, in the latter two books the same argument appears in relation to later Bills. In all three books supposed practical (or political) and supposed legal difficulties are made to interact and are thus built up into absolutes. No man could with the best will in the world isolate his political thoughts from his strictly juristic ones. Here again then there is perhaps a greater case to be made for examining the legal side of the development of doctrines of parliamentary sovereignty without making the initial assumption that the Diceian view must be the conclusion and must therefore govern that examination.

" The process of Constitutional adjudication does not thrive on conjuring up horrible possibilities that never happen in the real world, and devising doctrines sufficiently comprehensive in detail to cover the remotest contingency." That remark of Frankfurter J. in *New York* v. *U.S.* (1946) 326 U.S. 572, is not solely applicable to the process with which he was concerned. It applies equally to the formulation of constitutional principles by enactment or by writing. In this particular field of constitutional law the pragmatic approach has been abandoned, the absolute has been adopted and made rigid, not because this was essential, but because of other " horrible possibilities " and from this have flowed all the difficulties over the Statute of Westminster and the like. Elsewhere in our constitution we abandon our absolutes readily. Republics are freely admitted to the Commonwealth, Dominions remain neutral in war, even though only a short time before these things happened the advancement of such ideas would have been regarded as the advancement of heresy. To suggest that the current doctrine of parliamentary sovereignty can yet be profitably examined and perhaps challenged is not then to suggest a useless or impossible task.

As has been indicated, that examination might well take somewhat different lines from those fully pursued by Dr. Marshall. Too much may here have been said of those possible lines, but it has not been said in denigration of Dr. Marshall's work. His book provides an impetus to further work, and it does more. The able discussion in the early chapters and throughout does much to provide a clearer framework of thought; the material in those and in the later specific chapters is abundant and stimulating. This combination means that any further work will owe a great deal to the present book, but for what that book does in itself Dr. Marshall deserves both praise and thanks.

J. D. B. M.

An American Constitutional Law Reader. Selected and edited by Professor Robert B. McKay of New York University School of Law. Docket Series Volume 12. 1958. New York: Oceana Publications. Price U.S. $3.50 cloth-bound, $1.00 paper-bound.

To write a comprehensive book on the constitution of the United States of America would now be an almost impossible task for any one man; to expose the essentials with clarity and sufficient accuracy through a case book or the like without making an unwieldy book is nearly as difficult. To ask for completeness in a book the size of the present one would then be unreasonable, yet what surprises about it is not what has been left out, but how much has been got in. The book is made up of excerpts from cases, from articles and from books, with some notes and introductory passages by the compiler. The material is grouped round the topics of Judicial Review, Congress and Legislative Power, The President and the Executive Power and Constitutional Limitations. The material has been well chosen to show both the main certainties and uncertainties—the passages in the Commerce Clause consisting of extracts from two cases, and an informative and argumentative article, give a good illustration of the merits of the book. It is true that in such articles the authors use the "short-hand" phrases of American constitutional law, which are not always self-explanatory, but this raises no real obstacle to the book as an introduction. It has moreover the advantage that it is as up to date as is reasonable or necessary for a book with its purposes; thus, among recent cases there is included, apart from the *Segregation Cases*, *Watkins* v. *U.S.* (1957) which may mark a fresh shift in attitude to the First Amendment Freedoms. Clearly the book does not purport to give a full systematic discussion of a complex constitution: what it aims to do is to provide essentials for an understanding of the working of these constitutions and within the limits of space available it has been remarkably successful.

J. D. B. M.

L'Adoption dans les Législations Modernes. Second Edition. By M. le Conseiller Marc Ancel, with specialist editors. 1958. Paris: Sirey.

The publication of this comparative study of the law of adoption comes at an opportune moment, since legislation to implement at least some of the recommendations of the Hurst Committee appears to be imminent. The book consists of a brief *résumé* of the law of adoption in more than fifty countries, supplemented by an introduction and general survey prepared by the editor-in-chief, M. Ancel. This brilliant introduction is the highlight of the work. It treats briefly of the history, social function and juridical character of the institution of adoption, and thereafter considers in more detail the approach of different legal systems to the various problems which are inherent in it. Perhaps the most interesting general trend which emerges is the movement of adoption away from the field of purely private and contractual relations. Like marriage, adoption has a contractual basis, but it is becoming increasingly an institution of public law.

The chapter on adoption in the United Kingdom was written by Mme. M. Simon-Depitre, a French specialist on English law. It contains a concise and accurate description of the English law of adoption, and notices the main differences between that law and the law of Scotland. The features of our system most distinctive to a foreign lawyer appear to be the importance attached to consents and the degree of emphasis upon the protection of the adoptive child. M. Ancel, indeed, describes our prohibition of the adoption of females by males as something of a *curiosité législative*. A study, however, of other systems shows that our own stands well to the front in its enlightened approach to one of the more important social phenomena of our times.

A. E. ANTON.

Administration of Justice in Norway. A Brief Summary. Edited and published by the Royal Norwegian Ministry of Justice. 1957. Oslo. Price 5s. net.

Many countries are so complacent about their own systems of law that they do not trouble to find out about those of their neighbours and, except for the linguists, such knowledge is difficult to acquire. Recognising this, the Norwegian Ministry of Justice have put us in their debt by publishing in English this little book, which is an abridged translation of one prepared for circulation in other Scandinavian countries as well as in Norway itself. The English version has been prepared with skill by Judge J. Aans Rynning of the Court of Appeals, Oslo. If proof be needed, it shows that Norway has a highly developed system and that there are institutions in it, as indeed in many of the civil law systems, which our reformers might take into account.

The book starts with a short historical sketch, dealing with codification and the development of the court system, before proceeding to the present position.

The special features of Norwegian law have to be considered against the background of the features common to civil law jurisdictions comparatively unfamiliar here, while many of the Norwegian institutions are in advance of those in countries with comparable systems. We are thus getting a picture of a country from which neighbouring countries also may have something to learn.

In the section dealing with civil cases, it is to be noticed that these all start in the local court, the county or town court. In general they are preceded by appearance before a Conciliation Council. The cases are frequently heard by courts consisting of professional and lay members sitting together. The English jury in civil cases is not one of their institutions. Lay members may even be used in the Court of Appeals, and witnesses may be heard before it. There is also an appeal to the Supreme Court, more limited in scope, but considerably wider than, for example, that of the French Court of Cassation.

The conduct of the case is controlled by the judge, who examines the litigants himself and may take over the examination of the witnesses from the counsel appearing. Cross-examination in our sense of the word is not a feature of Norwegian or, indeed, Continental procedure. There is, of course, no profession of barrister distinct from other lawyers, though there is some specialisation in this respect.

In criminal cases, the courts are the same as those for civil cases. The lower court sits with lay assessors. The Court of Appeals, which is the court of trial for serious cases, sits with a jury, unlike civil cases. The lower court is competent to decide most cases where the facts are not in dispute. It also acts in taking declarations of accused persons and for conducting a preliminary examination as in England. But the case is, of course, under the charge of the Public Prosecution Authority, resembling Scottish practice.

As regards evidence, although the primary rule is that evidence must be given in court, considerably more latitude for using recorded evidence seems to be given than with us. On the other hand, exemptions from compulsion to give evidence are much wider, extending to direct ascendants, descendants or collaterals. The court can be informed of the accused's criminal record at the opening of the trial. An accused person's refusal to testify is his own business but he is told it may be used against him. Differing views as to rules of evidence therefore can be held in equally free countries!

To some the greatest contrast will appear to be the remuneration of judges, this ranging from £1,500 for judges of the town and county courts to £2,400 for the President of the Supreme Court. It must be remembered that State officials and judges in Britain enjoy a scale of salary far in excess of what is considered necessary in many Continental countries. A good many judges get official residences at moderate rents, of which some pleasant ones are shown in illustrations, sometimes conjoined with the court building. But anyone who has met Norwegian judges is aware that the respect and reputation due to them does not rest on a money valuation.

This little book represents a form of comparative legal study which well repays perusal and incites hopes that other countries should give us a similar opportunity to learn about them.

S. G. K.

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(*A later review is not precluded, especially where books are received shortly before going to press.*)

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